Supreme Court, U.S.
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Case No.: 981138

In The

Supreme Court of the United States

October Term, 1998

MICHAEL A. SCOTT

Petitioner,

versus

NORFOLK SOUTHERN CORPORATION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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25pp

QUESTIONS PRESENTED

(1) Whether the District Court erred in dismissing the plaintiff's claims under the Civil Rights Act of 1866, 42 U.S.C. § 1981, against all defendants and in not allowing him to present evidence to support such claims?

(2) Whether the District Court erred in refusing to allow the plaintiff to claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, that his job transfer, on-the-job harassment and employment termination were due to his black race and were acts of retaliation for having previously filed a charge of discrimination with the Federal Equal Employment Opportunity Commission and subsequent lawsuit based on that charge against Norfolk Southern Corporation?

PARTIES TO THE PROCEEDING

In addition to Norfolk Southern Corporation, individual defendants David R. Goode, Stephen C. Tobias, Donald W. Mayberry, Jon L. Manetta, William E. Honeycutt, C. David Vittur, Donald D. Graab, Artis L. Luttrell, Timothy A. Heilig, Lewis D. Hale, Jerry R. Gray, Wayne F. Henley, Jeff E. Pair and Jerry W. Clemmer were parties before the Court of Appeals.

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Statutes Cited:

Civil Rights Act of 1866, 42 U.S.C. § 1981 . . . . . *passim*

Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* . . . . . *passim*

28 U.S.C. § 1254(1) 1

Rules Cited:

Federal Rule of Civil Procedure 8(f), 28 U.S.C. . . . . *passim*

Federal Rule of Civil Procedure 10(c), 28 U.S.C.
. . . . . *passim*

Federal Rule of Civil Procedure 12(b)(6), 28 U.S.C.
. . . . . *passim*

Federal Rule of Civil Procedure 15, 28 U.S.C.
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Federal Rule of Civil Procedure 56, 28 U.S.C.
. . . . . *passim*

Other Authority Cited:

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TO THE HONORABLES, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner Michael A. Scott ("Scott"), as *pro se*, respectfully requests that a *writ of certiorari* be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fourth Circuit is provided in Appendix A. The opinion and order of the district court regarding the petitioner's claim under the Civil Rights Act of 1866, 42 U.S.C. § 1981 is provided in Appendix C. The opinion and order of the district court denying the petitioner to claim his job transfer, harassment and employment termination as racially motivated and as acts of retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, is provided in Appendix D.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit ("Court of Appeals") was entered on June 24, 1998 (App. A). The Court of Appeals denied a timely petition for rehearing and suggestion for rehearing in banc on August 10, 1998 (App. B).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, provides, in pertinent part, the following:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

The Civil Rights Act of 1866, 42 U.S.C. § 1981 provides, in pertinent part, the following:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

Federal Rule of Civil Procedure, 28 U.S.C., Rule 8(f) provides:

> All pleadings shall be so construed as to do substantial justice.

Federal Rule of Civil Procedure, 28 U.S.C., Rule 10(c) provides, in pertinent part, the following:

> A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

STATEMENT OF THE CASE

The fundamental question in this case is whether litigants are entitled to have the exhibits appended to their pleadings and the contents therein considered and construed by the district court in deciding a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) and a motion for summary judgment under Federal Rule of Civil Procedure 56. To fully appreciate the significance of the issues presented by this case, it is essential to consider its procedural background.

A. Background Of The District Court's Dismissal Of Petitioner's § 1981 Claim.

On March 11, 1996, Scott filed a 32 count *pro se* complaint against his former employer Norfolk Southern Corporation ("NS"), and 14 individual executives, managers and supervisors of NS (collectively referred to hereinafter as "Individual Defendants"). Scott claimed that he had been harassed, transferred and discharged because of his black race and as acts of retaliation against him for having previously filed a charge of discrimination against NS with the Federal Equal Employment Opportunity Commission ("EEOC") and a subsequent lawsuit in the United States District Court for the Eastern District of Virginia against NS

based on that charge. The district court permitted Scott to amend his complaint three times; a fourth motion to amend was denied on June 6, 1996. NS and the Individual Defendants moved to dismiss the third amended complaint under Federal Rule of Civil Procedure 12(b)(6) on May 7, 1996. In August 1996, the district court dismissed twenty-four (24) of the thirty-two (32) counts alleged in the third amended complaint against NS, including the § 1981 claim, and dismissed all claims against the Individual Defendants. The district court granted Scott leave to re-plead the eight (8) remaining counts against NS which included his claim under Title VII for retaliation and racial discrimination. Thereafter, Scott filed a motion for reconsideration with the district court asking it to reinstate his § 1981 claim. The district court denied that motion. Discovery was stayed in the case until after the district court ruled on the defendants' motion to dismiss, which occurred on August 5, 1996.

On August 16, 1996, Scott filed his fifth amended complaint pursuant to the district court's order at the August 5, 1996 hearing, which NS answered on September 3, 1996. The eight counts included in the fifth amended complaint were: (1) Title VII racial discrimination and retaliation; (2) personal injury under the Federal Employers' Liability Act ("FELA"); (3) assault and battery; (4) wrongful discharge under Virginia law; (5) intentional infliction of emotional distress under the FELA; (6) negligent infliction of emotional distress under the FELA; (7) intentional infliction of emotional distress under Virginia law; and (8) negligent infliction of emotional distress under Virginia law.

Appended as exhibits to both the third and fifth amended complaint was Scott's charge of discrimination (App. E) and supporting affidavit (App. F) he filed with the EEOC against NS in March 1996 which gave rise to the case at bar. In the EEOC charge of discrimination, Scott alleged, in part, the following:

> 1. I was hired by the Respondent on August 16, 1985 as a Management Trainee. I filed a

charge of discrimination with the EEOC during January, 1995 against the Respondent and afterwards I was harassed through increased work load and close scrutiny. During the court action involving my charges, I was told to resign as part of settlement or be sent to some place I did not like. After the court proceedings, I was told of my job abolishment and mandatory transfer on February 7, 1996 and to report to work in Decatur, Illinois on February 16, 1996. I was discharged from the position of Mechanical Foreman on February 16, 1996.

3. I believe I was harassed, transferred, and discharged because of my race, Black, and as an act of retaliation because I filed a charge with the EEOC, all in violation of Title VII of the Civil Rights Act of 1964, as amended.

(App. E). In the EEOC affidavit, Scott alleged, in part, the following:

Last summer, W. F. Henley, a White General Foreman, made threats of violence/bodily harm and death against me because I filed the charge. He was one of the persons I accused concerning sexual harassment.

J. R. Gray, a White Assistant Master Mechanic; D. D. Graab, a White Master Mechanic; J. W. Clemmer, a White General Foreman; and J. E. Pair, a White Engineer harassed me by making accusations that I was not participating with other supervisors, not being a team player with other White supervisors, and not regularly attending safety meetings.

> J. W. Clemmer stated I was an incompetent Black Engineer.
>
> I was given more and bigger projects than J. E. Pair, J. A. Scott, and J. W. Clemmer to be completed in the same length of time. J. R. Gray gave these assignments through J. E. Pair.
>
> I was followed by private investigators hired by the Respondent. I was able to obtain the evidence to establish I was being followed. I was discharged after I took a letter to J. R. Gray which complained about being followed by the private investigators.

(App. F). Scott's third amended complaint (¶¶ 66, 68-70) clearly established "April 1994", "January 1995" and "Summer 1995" as the dates from which the harassment, and ultimately the transfer and discharge, he alleged in the third amended complaint began and made numerous specific allegations of racial discrimination which had occurred since those dates. Indeed, Scott made several specific allegations of racial harassment, transfer and discharge enumerated in his third amended complaint (¶¶ 69-78, 90-93, 103-106) which supported, echoed and further explicated the allegations he made in his EEOC charge of discrimination and its supporting affidavit appended as exhibits to the third amended complaint. Scott alleged in ¶¶ 69-78 of the third amended complaint that the specific racially harassing conduct was made "in reaction to" and or "after" he filed the January 1995 EEOC charge of discrimination against NS. The instant case was filed in March 1996 and, therefore, any of his allegations cognizable under § 1981 were timely.

Significantly, the district court, in dismissing Scott's § 1981 claim against all defendants, stated, in part, the following:

> [T]he statute of Limitation under 42 U.S.C. § 1981 is two years . . . Scott's EEOC charge and subsequent Title VII lawsuit alleged male-on-male sexual harassment. Scott has not alleged that he was the victim of racial discrimination within the two year Statute of Limitation.

(App. C at 4). Scott filed his initial *pro se* complaint in the underlying action on March 11, 1996. Therefore, Scott's § 1981 claim should have encompassed racially discriminatory conduct that was alleged to have occurred since March 11, 1994. In apparent direct contrast in its decision granting Scott leave to amend his Title VII racial discrimination and retaliation claim, the district court stated, in part, the following:

> As to Scott's claims against Norfolk Southern, Defendants contend that Scott's allegations relate to events which occurred before the 300 day deadline preceding the EEOC filing, and are thus barred under 42 U.S.C. § 2000e-5(e). **Scott's makes several allegations in the EEOC charge and in his Complaint that are not dated** so the Court cannot determine in what time period these events happened.

Id. at 3 (emphasis added). Interestingly, the district court apparently considered the allegations Scott made in the EEOC charge in deciding to grant him leave to amend his Title VII claim for racial discrimination and retaliation, but apparently failed to do so in dismissing Scott's § 1981 claim and in refusing to allow him to claim that the harassment, job transfer and discharge were racially motivated and acts of retaliation under Title VII.

B. Background Of The District Court's Refusal To Allow The Petitioner To Claim That The Harassment, Job Transfer And Discharge Were Racially Motivated And Acts Of Retaliation Under Title VII Of The Civil Rights Act Of 1964.

On December 16, 1996, NS filed motions to dismiss and for summary judgment, filing in support of the motions Scott's deposition, exhibits, and affidavits of Respondents Jerry R. Gray, Jeff E. Pair, and Timothy A. Heilig, and NS Police Director, Steven G. Hanes. Scott filed a brief in opposition, exhibits and his own affidavit. Following the briefing, a hearing was held on January 28, 1997 during which the district court granted summary judgment for NS on Scott's Title VII equal compensation and promotion claims, and on the intentional infliction of emotional distress counts under both Virginia law and the FELA. The district court denied NS's motions with respect to the remaining claims.

Scott argued to the district court that he was contending his job transfer, on-the-job harassment and employment termination were due to his black race and were acts of retaliation for having previously filed a charge of discrimination with the EEOC against NS. However, the district court articulated that while Scott was then apparently contending that his transfer, harassment and discharge were both retaliatory and racially motivated, the specific theories pleaded in the fifth amended complaint were racial discharge and retaliatory transfer, and not retaliatory discharge or racial transfer and, therefore, limited his claims to his fifth amended complaint allegations. (Hearing, Tr. 1/28/97 at 37). In its opinion and order, the district court stated:

> In Scott's brief in opposition to the defendant's motion for summary judgment, and at the January 28, 1997 hearing, Scott also argued that his termination was in retaliation for filing charges with the EEOC and related lawsuits, and

> that his transfer was racially motivated. This Court has granted Scott numerous opportunities to amend his complaint. Nevertheless, Scott has never made such allegations in any of his amended complaints. Accordingly, the Court will not allow him to advance these new theories at this late stage of the proceedings.

(App. D at 8, n. 2).

Subsequently, NS renewed its motion to dismiss the Title VII retaliatory transfer claim in Count I of the fifth amended complaint at the February 14, 1997 motion in Limine hearing. The district court granted the motion and dismissed the retaliatory transfer claim at that time. A jury was selected on February 18, 1997 and trial was continued until March 24, 1997. Following the jury deliberations on the seventh and eighth day of trial, the jury returned a verdict in favor of NS with respect to Scott's Title VII racial harassment and racial discharge claims, the wrongful discharge claim under Virginia law, and the assault and battery claims. The jury returned a verdict against NS and in favor of Scott on the FELA injury claim. During the trial, the district court did not allow Scott to present any evidence of promotion denials and disparate pay (both cognizable under the dismissed § 1981 claim) because it had previously granted NS summary judgment on those Title VII claims. Transcripts of the district court's hearings on the Respondents' motion to dismiss the third amended complaint (August 5, 1996), and NS's motions to dismiss and for summary judgment on the fifth amended complaint (January 28, 1997) are a part of the record in this case.

Scott noted an appeal on April 10, 1997 against NS and the Individual Defendants, which included an appeal of the district court's dismissal of his Title VII retaliation claim (and its refusal to allow Scott to claim both racial and retaliatory harassment, transfer and discharge) against NS and dismissal of his § 1981 claim

against all Respondents. The Court of Appeals vacated and remanded Scott's Title VII retaliatory transfer claim against NS to the district court, but affirmed, without opinion, the remainder of the district court's rulings appealed by Scott (App. A).

Taken together, the import of the Court of Appeals and the district court's ruling is clear. In refusing to consider and construe Scott's EEOC charge of discrimination and its supporting affidavit securely appended to and referenced in both the third and fifth amended complaint, the opinions below imply that a litigant who attaches to his complaint documents which contain specific allegations that are fountainhead of his complaints has no right to rely on those documents and their allegations as part of his complaint to support his legal claims, and also ignores or trivializes the important role of the Federal Rules of Civil Procedure, Rules 8(f) and 10(c), in construing pleadings.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULINGS ON CONSTRUING PLEADINGS OF LITIGANTS PROCEEDING WITHOUT THE AID OF PROFESSIONAL COUNSEL.

Scott's petition for *writ of certiorari* should be granted because the opinion below conflicts with this Court's important settled precedents with regard to the standards under Federal Rule of Civil Procedure 12(b)(6) courts should apply when construing the complaint of a litigant who is proceeding without the aid of counsel. In delineating the contours of these standards, this Court has consistently held that it is settled law that allegations such as those presented by Scott in his third and fifth amended complaint, "however inartfully pleaded" are held "to less stringent standards

than formal pleadings drafted by lawyers . . ." *Haines v. Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, 595, 30 L.Ed.2d 652 (1972); *Hughes v. Rowe*, 101 S.Ct.173 (1980), 449 U.S. 5, 66 L.Ed.2d 163. This Court reaffirmed the principles of *Haines* in *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S.Ct. 285, 292, 50 L.Ed.2d 251 (1976): "As the Court unanimously held in *Haines v. Kerner*, 404 U.S. 519 [92 S.Ct. 594, 30 L.Ed.2d 652] (1972), a *pro se* complaint, 'however inartfully pleaded,' must be held to 'less stringent standards than formal pleadings drafted by lawyers' and can only be dismissed for failure to state a claim if it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' *Id.*, at 520, 521 [92 S.Ct., at 595-596] quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 [78 S.Ct. 99, 101-102, 2 L.Ed.2d 80] (1957)." The issue is not whether Scott was likely to ultimately prevail on his § 1981 claim, "but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleading that a recovery is very remote and unlikely but that is not the test." *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974). The Court of Appeals and other lower courts have appropriately applied with special care these standards with regard to *pro se* complainants pleading civil rights claims in that "district courts must be especially solicitous of civil rights plaintiffs." *Canty v. City of Richmond, Va. Police Dept.*, 383 F.Supp. 1396 (E.D.Va. 1974), *affirmed*, 526 F.2d 587 (4th Cir. 1975), *cert. denied.*, 423 U.S. 1062, 96 S.Ct. 802, 46 L.Ed.2d 654 (1976); *Burns v. State Department of Public Welfare of S. C.*, 491 F.2d 762 (4th Cir. 1974); *Hernandez v. Coughlin*, 18 F.3d 133, 136 (2nd Cir.), *cert. denied*, 115 S.Ct. 117, 130 L.Ed.2d 63 (1994); *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696 (9th Cir. 1990).

Scott concedes that the district court did allow him to amend his complaint four times. However, Scott takes exception to the district court's finding that there was no set of facts provable by him in the third amended complaint for his § 1981 claim against all defendants. Indeed, the district court allowed Scott to amend his Title VII claim against NS which also included allegations of racial

discrimination. Ironically, the time limitations for a Title VII action was 300 days as compared to 2 years for a § 1981 claim. *See* App. C at 3, 4. It is now established doctrine that pleadings should not be scrutinized with such technical nicety that a meritorious claim should be defeated, and even if the claim is insufficient in substance, it may be amended to achieve justice. *Rice v. Olson,* 324 U.S. 786, 791-92, 65 S.Ct. 989, 89 L.Ed. 1367 (1945); *Holiday v. Johnston,* 313 U.S. 342, 350, 61 S.Ct. 1015, 85 L.Ed. 1392 (1941). Despite the number of times the district court allowed Scott to amend his complaint, it should have given him the benefit of a liberally construed complaint (with its attached exhibits) in the spirit embodied in Federal Rules of Civil Procedure 8(f), 10(c) and 15. *Beacon Theatres, Inc. v. Westover,* 79 S.Ct. 948, 359 U.S. 500, 3 L.Ed.2d 988 (1958).

Scott's petition should be granted so that this Court may affirm the importance of its long standing holdings on construing complaints for litigants invoking the federal judicial machinery without professional counsel for resolution of their complaints, and so that it may confirm for the first time the applicability of the unambiguous language of Federal Rule of Civil Procedure 10(c) to written documents attached to a pleading and how such documents and their contents should be construed with the pleading.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THE REQUIREMENTS OF FEDERAL RULE OF CIVIL PROCEDURE 10(c) AND THE OPINION OF OTHER FEDERAL COURTS OF APPEALS.

Scott's petition for *writ of certiorari* should be granted because the opinion below conflicts with the unambiguous language of Federal Rule of Civil Procedure 10(c) and the opinion of other federal courts of appeals that have construed pleadings with exhibits attached under Rule 10(c).

As stated in section B above, the district court concluded that Scott had "never" made allegations in any of his amended complaints that the harassment, job transfer and discharge were racially motivated and acts of retaliation for having previously filed an EEOC charge. That conclusion was clearly erroneous. Scott appended to his fifth amended complaint the EEOC charge of discrimination and supporting affidavit he filed with the EEOC in March 1996 as exhibits and made reference to them in the fifth amended complaint (App. E & F). Both the EEOC charge of discrimination and affidavit made a specific allegation that Scott was harassed, transferred and discharged because of his black race and as an act of retaliation for having previously filed an EEOC charge against NS.

Federal Rule of Civil Procedure 10(c) provides, in pertinent part, the following: "A copy of any [written instrument] which is **an exhibit to a pleading is a part thereof for all purposes.**" (emphasis added). Moreover, "[t]he **contents** of the written instrument **will be considered in determining the party's claim for relief** or defense or for any motion for relief." *Moore's Federal Practice 3D*, § 10.05[1] (emphasis added). The issue is not how many times the district court allowed Scott to amend his complaint, but rather how the district court actually construed the operative complaint in deciding the defendant's dispositive motions. Scott's EEOC charge of discrimination and affidavit securely attached as exhibits to his third and fifth amended complaint and referred to in the complaints were the inception from which his Title VII and § 1981 claims grew and it was clear from a review of the third and fifth amended complaint that those allegations alleged therein and in the EEOC charge of discrimination and affidavit were the germane issues before the district court and set the context of Scott's complaints and concerns. Casting the circumstances of this case in this light, the defendants had sufficient notice of Scott's complaints, allegations and real concerns. "Where the context, as here, makes clear a litigant's essential grievance, the complainant's additional invocation of general legal principles need not detour the district

court from resolving that which the litigant himself has shown to be his real concern." *Beaudett v. City of Hampton*, 775 F.2d 1274 (4th Cir. 1985).

The district court's denial of Scott to claim the harassment, job transfer and discharge as both racially motivated and retaliatory flies-in-the-face of the liberal standards adopted by the courts in construing pleadings, especially *pro se* pleadings in civil rights litigation. *Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d 621 (9th Cir. 1988). Despite the number of times Scott was allowed to amend his complaint, he consistently appended the EEOC charge of discrimination and affidavit as exhibits to each amended complaint because of the specific allegations contained in them. The district court presumably recognized its responsibility to construe the complaint exhibits under Rule 10(c) in deciding dispositive motions, but failed to apply that standard to Scott's exhibits securely attached to his third and fifth amended complaint (App. C at 2).

In denying Scott to claim the harassment, job transfer and discharge as both racially motivated and retaliatory conduct, the district court either failed to apply or ignored the important requirements in Federal Rule of Civil Procedure 10(c) that "any [written instrument] which is **an exhibit to a pleading is a part thereof for all purposes.**" Fed. R. Civ. P. 10(c) (emphasis added). The district court's ruling, and the Court of Appeals affirming that ruling, articulated above regarding Scott's Title VII claim trivializes the effect of Rule 10(c) and conflicts with the opinion and approach of other courts of appeals, **including the Fourth Circuit**, to the application of Fed. R. Civ. P. 10(c) to exhibits attached to pleadings. See *Fayetteville Investors v. Commercial Builders, Inc.*, 936 F.2d 1462 (4th Cir. 1991) (exhibits to complaint considered in deciding motion to dismiss); *Simons v. Montgomery County Police Officers*, 762 F.2d 30 (4th Cir. 1985); *Sinclair Refining Co. v. Stevens*, 123 F.2d 186 (8th Cir. 1941), *cert. denied*, 62 S.Ct. 632, 315 U.S. 804, 86 L.Ed. 1203; *Hamilton Foundry & Machine Co. v. International*

Molders & Foundry Workers, 193 F.2d 209 (6th Cir. 1951), *cert. denied*, 72 S.Ct. 1060, 343 U.S. 966, 96 L.Ed. 1363; *Park-In Theatres v. Paramount-Richards Theatres, DC*, 185 F.2d 407 (3rd Cir. 1950), *cert. denied*, 71 S.Ct. 1017, 341 U.S. 1950, 95 L.Ed.1373; *Solis-Ramirez on Behalf of Solis v. U.S. Department of Justice*, 758 F.2d 1426 (11th Cir. 1985); *Hall v. Bellmon*, 935 F.2d 1106, 1112 (10th Cir. 1991) (written document deemed attached to complaint and incorporated as exhibit therein considered in subsequent motion to dismiss complaint); *Cortec Industries, Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2nd Cir. 1991) (we have held that the complaint is deemed to include any written instrument attached to it as an exhibit); *Hoff Supply Co. v. Allen-Bradley Co.*, 768 F.Supp. 132, 134 n.3 (M.D.Pa. 1991) (distributor agreements incorporated as exhibits to complaint considered in ruling on summary judgment motion); *Optical Alignment Sys. & Inspection Servs., Inc. v. Alignment Servs., Inc.*, 909 F.Supp. 58, 60 (D.N.H. 1995) (in ruling on motion to dismiss, court can consider documents attached to complaint or expressly incorporated by reference); *Kolbeck v. LIT Am., Inc.*, 923 F.Supp. 557, 560 (S.D.N.Y. 1996) (citing **Moore's,** court considered exhibits mentioned in and attached to pleadings in deciding motion to dismiss); *Venture Assoc. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431 (7th Cir. 1993); *Neville v. American Republic Ins. Co.*, 912 F.2d 813, 814, n.1 (5th Cir. 1990); *Fachee v. Daoust Const. Co.*, 185 F.2d 23 (7th Cir. 1950); *Schnell v. City of Chicago*, 407 F.2d 1084 (7th Cir. 1969).

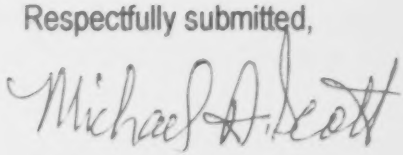
CONCLUSION

This case presents a question of exceptional importance -- whether a litigant is entitled to have the written exhibits and their contents appended to a pleading construed as part of the pleading in opposing a motion to dismiss under Fed. R. Civ. P. 12(b)(6) and a motion for summary judgment under Fed. R. Civ. P. 56. If the opinion below is allowed to stand, the Court of Appeals and district court's approach to construing Scott's third and fifth amended

complaints will have thwarted the liberal approach of the Federal Rules of Civil Procedure to pleading and, therefore, held Scott's *pro se* complaints to standards not envisioned by this Court. By granting Scott's *petition for certiorari,* however, this Court can correct the Fourth Circuit's decision, which defies this Court's long standing holdings that a claimant proceeding without the aid of counsel should have his pleadings held to "less stringent standards" than those "drafted by lawyers"; can correct the erroneous fact-finding of the district court regarding Scott's § 1981 claim against all defendants; and can correct the Court of Appeals and district court's erroneous application of Fed. R. Civ. P. 10(c) to the manner in which they construed Scott's third and fifth amended complaints.

Accordingly, the petitioner, Michael A. Scott, respectfully requests that his petition for *writ of certiorari* be granted.

Respectfully submitted,



Michael A. Scott
Petitioner, *pro se*

Michael A. Scott
4753 Longmont Road
Virginia Beach, Virginia
23456-5017
(757) 495-0844

Supreme Court, U.S.
FILED

98 1138 NOV 6 1998

OFFICE OF THE CLERK

Case No.:

In The

Supreme Court of the United States

October Term, 1998

MICHAEL A. SCOTT

Petitioner,

versus

NORFOLK SOUTHERN CORPORATION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONER'S APPENDIX

MICHAEL A. SCOTT
4753 Longmont Road
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Petitioner Appearing Pro Se

48PP

APPENDIX A
UNPUBLISHED OPINION OF THE
UNITED STATES COURT OF APPEAL FOR THE FOURTH CIRCUIT

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MICHAEL A. SCOTT,

Plaintiff-Appellant,

v.

NORFOLK SOUTHERN CORPORATION; D. R. GOODE, individually and in his official capacity with Norfolk Southern Corporation; S. C. TOBIAS, individually and in his official capacity with Norfolk Southern Corporation; J. L. MANETTA, individually and in his official capacity with Norfolk Southern Corporation; D. W. MAYBERRY, individually and in his official capacity with Norfolk Southern Corporation; W. E. HONEYCUTT, individually and in his official capacity with Norfolk Southern Corporation; L. D. HALE, individually and in his official capacity with Norfolk Southern Corporation; T. A. HEILIG, individually and in his official capacity with Norfolk Southern Corporation; C. D. VITTUR, individually and in his official capacity with Norfolk Southern Corporation; D. D. GRAAB, individually and in his official capacity with Norfolk Southern Corporation; A. L. LUTTRELL, individually and in his official capacity with Norfolk Southern Corporation; J. R. GRAY, individually and in his official capacity with Norfolk Southern Corporation; W. F. HENLEY, individually and in his official capacity with Norfolk Southern Corporation; J. E. PAIR,

No. 97-1490

individually and in his official capacity with Norfolk Southern Corporation; J. W. CLEMMER, individually and in his official capacity with Norfolk Southern Corporation,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Virginia, at Norfolk.
Henry C. Morgan, Jr., District Judge.
(CA-96-257-2)

Submitted: June 2, 1998

Decided: June 24, 1998

Before WIDENER, WILLIAMS, and MOTZ, Circuit Judges.

Affirmed in part, vacated in part, and remanded by unpublished per curiam opinion.

COUNSEL

Michael A. Scott, Appellant Pro Se. James Stanton Whitehead, SIDLEY & AUSTIN, Chicago, Illinois; Samuel Johnson Webster, Heather Ann Mullen, David Nash Payne, WILLIAMS, KELLY & GREER, Norfolk, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Michael A. Scott appeals from several district court orders dismissing a variety of claims involved in Scott's employment discrimination action. We affirm in part, vacate in part, and remand.

Scott was employed by the Defendant, Norfolk Southern Corporation ("Norfolk Southern") from August 1985 to February 1996. In 1995, Scott filed a discrimination complaint with the Equal Employment Opportunity Commission ("EEOC") alleging same-gender sexual harassment and a sexually hostile environment. Following his termination, Scott filed another discrimination complaint with the EEOC alleging racial discrimination and retaliation for the filing of his 1995 EEOC complaint.

Following the 1996 EEOC charge, Scott filed this complaint against Norfolk Southern and fourteen individual executives, managers and supervisors of Norfolk Southern, setting out twenty-four counts based on Title VII and the on-the-job injury. Scott amended his complaint three times, and the district court entered an order accepting Scott's third amended complaint, which set forth thirty-two counts, as the operative complaint.* Defendants filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6).On August

*On May 3, 1996, Scott filed a motion to amend his complaint for the fourth time. The district court denied the motion on June 7, 1996.

14, 1996, the district court entered an order dismissing all claims against the individual Defendants, dismissing counts 2-21, 23, 24, 31 and 32 against Norfolk Southern, and granting Scott leave to amend counts 1, 22, 25, 26, 27, 28, 29, and 30 against Norfolk Southern. Pursuant to the court's August 14 order, Scott again amended his complaint against Norfolk Southern setting forth the eight counts.

On February 5, 1997, the district court granted summary judgment to Norfolk Southern on counts 5, 6, 7, and 8, and denied Norfolk Southern's motion to dismiss on count 4—leaving counts 1, 2, 3, and 4. On April 1, 1997, the court entered an order dismissing part of Scott's count one. A jury trial commenced on February 18, 1996, and final judgment was entered April 4, 1996. The jury verdict dismissed counts 1, 2, and 4, and found in favor of Scott on count 3. Scott was awarded $4998 with interest at the rate of 6%. Scott timely appealed.

On appeal, Scott raises several issues concerning each of the district court's orders. The first issue raised is that the district court erred in its April 1, 1997 order by dismissing his Title VII claim of retaliation. Scott alleged that he was transferred in February 1996 as a result of his 1995 EEOC charge, in which he asserted same-gender sexual harassment and a sexually hostile environment. In dismissing Scott's Title VII retaliation claim, the district court relied on *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191 (4th Cir. 1996), and *Mayo v. Kiwest Corp.*, No. 95-2638, 1996 WL 460769 (4th Cir. August 15, 1996) (unpublished). In *McWilliams*, this Court held that same gender sexual harassment was not actionable under Title VII absent an allegation that either the victim or the harassers were homosexual or bisexual. *See McWillaims*, 72 F.3d 1195.

In *Mayo*, this Court held that "Title VII prohibits an employer from discriminating against an employee in retaliation for that employee's . . . complaint about [ ] and employment practice made unlawful under Title VII." *Mayo*, 1996 WL 460769 at **4. The Court stated that the employee needed to have an "objectively reasonable belief that he was the victim of discrimination made unlawful under Title VII." *Id.* Looking at the state of the law at the time of Mayo's complaint, this Court found that "no court had held a hostile-environment claim actionable where both the alleged harasser and the alleged victim were of the same sex, no claim was made that either the alleged harasser or the alleged victim was homosexual or bisexual, and no claim was made that the alleged harasser treated men in the workplace differently than women." *Id.* at **5. Given the state of the case law, the Court determined that Mayo was not reasonable in believing that his claim was actionable under Title VII and thus, there was no protected activity on which to base a retaliation claim. *Id.*

However, the Supreme Court has recently issued its decision in *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998 (1998), in which the Court held that sex discrimination consisting of same-sex sexual harassment is actionable under Title VII and that it is not necessary that the harasser be shown to be homosexual or bisexual. *See Oncale*, 118 S. Ct. at 1002. The Court stated that "harassing conduct need not be motivated by sexual desire to support the inference of discrimination on the basis of sex." Because *Oncale* overrules previous precedent in this Circuit, we vacate that portion of the district court's April 1, 1997 order dismissing Scott's Title VII retaliation claim and remand for further proceedings in light of *Oncale*. We affirm the remainder of the district court's April 1 order.

As for Scott's remaining claims on appeal, we have reviewed the district court's orders and find no reversible error. Accordingly, we affirm the remainder of the district court's orders to the extent that Scott has appealed them. We dispense with oral arguments because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

APPENDIX B
ORDER OF THE
UNITED STATES COURT OF APPEAL FOR THE FOURTH CIRCUIT
DENYING PETITIONER'S REQUEST FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
LEWIS F. POWELL, JR. UNITED STATES COURTHOUSE ANNEX
1100 EAST MAIN STREET, SUITE 501
RICHMOND, VIRGINIA 23219-3517

August 10, 1998

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1 First National Plaza

Chicago, IL 60603

Re: 97-1490 Scott v. Norfolk Southern Cor
CA-96-257-2

Dear Counsel:

Enclosed is a copy of an order filed today in this case.

Yours truly,

PATRICIA S. CONNOR
Clerk

/s/ Donna Brown
By: _____
Deputy Clerk

Enclosure(s)

cc: Norman H. Meyer Jr.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
August 10, 1998

No. 97-1490
CA-96-257-2

MICHAEL A. SCOTT

Plaintiff - Appellant

v.

NORFOLK SOUTHERN CORPORATION; D. R. GOODE, individually and in his official capacity with Norfolk Southern Corporation; S. C. TOBIAS, individually and in his official capacity with Norfolk Southern Corporation; J. L. MANETTA, individually and in his official capacity with Norfolk Southern Corporation; D. W. MAYBERRY, individually and in his official capacity with Norfolk Southern Corporation; W. E. HONEYCUTT, individually and in his official capacity with Norfolk Southern Corporation; L. D. HALE, individually and in his official capacity with Norfolk Southern Corporation; T. A. HEILIG, individually and in his official capacity with Norfolk Southern Corporation; C. D. VITTUR, individually and in his official capacity with Norfolk Southern Corporation; D. D. GRAAB, individually and in his official capacity with Norfolk Southern Corporation; A. L. LUTTRELL, individually and in his official capacity with Norfolk Southern Corporation; J. R. GRAY, individually and in his official capacity with Norfolk Southern Corporation; W. F. HENLEY, individually and in his official capacity with Norfolk Southern Corporation; J. E. PAIR, individually and in his official capacity with Norfolk Southern Corporation; J. W. CLEMMER, individually and in his official capacity with Norfolk Southern Corporation,

Defendants - Appellees.

On Petition for Rehearing with Suggestion for Rehearing In Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court

/s/ Patricia S. Connor

_____

CLERK

APPENDIX C
OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT DISMISSING PETITIONER'S SECTION 1981 CLAIM

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

FILED AUGUST 14, 1996
CLERK, U.S. DISTRICT COURT
NORFOLK, VA

MICHAEL A. SCOTT,

Plaintiff,

v. Action No. 2:96cv257

NORFOLK SOUTHERN CORPORATION,
D. R. GOODE, et al.

Defendants.

OPINION AND ORDER

Pending before the court is Defendants' Motion to Dismiss, filed on May 17, 1996. Also pending in this case are Defendants' Motion for Injunction, filed on July 10, 1996 and Scott's Motion for an Extension of Time to respond to Defendants' Motion for an Injunction, filed on July 16, 1996. Defendants seek to enjoin Scott from filing anything further with the Court until all outstanding motions have been ruled upon.

I. FACTUAL AND PROCEDURAL HISTORY.

On May 2, 1996, plaintiff Michael A. Scott, filed a 32 count complaint against his former employer Norfolk Southern Corporation ("Norfolk Southern") and 14 individual executives, managers and supervisors of Norfolk Southern. Scott's voluminous claims all arise from allegations: (1) that Defendants have retaliated against him as a result of his filing charges of male-on-

male sexual harassment with the Equal Employment Opportunity Commission ("EEOC") and a subsequent Title VII lawsuit based upon that EEOC Charge in this Court; and (2) that he suffered an on-the-job personal injury for which he is entitled to damages under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 et seq.

II. Defendants' Motion To Dismiss.

a. STANDARD OF REVIEW

In deciding a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6), a court must accept the facts pleaded by the plaintiff as true. The claim should not be dismissed unless it appears to a certainty that the plaintiff can prove no facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Bruce v. Riddle, 631 F.2d 272, 273-74 (4th Cir. 1980). The court must accept the factual allegations in the complaint and must construe them in the light most favorable to the plaintiff. Martin Marietta Corp. v. International Telecommunications Satellite Org., 991 F.2d 94, 97 (4th Cir. 1992). The court can only rely upon the allegations in the complaint and those documents attached as exhibits or incorporated by reference. Simons v. Montgomery County Police Officers, 762 F.2d 30, 31 (4th Cir. 1985), cert. denied, 474 U.S. 1054 (1986). The Court shall consider each of the plaintiffs 32 Counts in turn and reference previous sections when appropriate.

B. Count 1

Count 1 is a claim under Title VII of the 1964 Civil Rights Act. Scott alleges that the Defendants discriminated against him on account of his race.

Scott cannot bring a Title VII suit against persons who were not named in his underling EEOC charge. Dickey v. Greene, 710

F.2d 1003, 1005 (4th Cir. 1983). None of the Defendants in the present suit except Norfolk Southern were named in Scott's EEOC charge. (Complaint, Ex. F.) Scott claims he properly referred to all of the Defendants in an EEOC charge he filed on March 6, 1996 alleging race and retaliatory discrimination but this did not put these Defendants on notice that they were being named in an EEOC charge. Therefore, Count 1 is **DISMISSED** against all of the Defendants except Norfolk Southern.

As to Scott's claims against Norfolk Southern, Defendants contend that Scott's allegations relate to events which occurred before the 300 day deadline preceding the EEOC filing, and are thus barred under 42 U.S.C. § 2000e-5(e). Scott's makes several allegations in the EEOC charge and in his complaint that are not dated so the Court cannot determine in what time period these events happened. Additionally, Scott complains of actions that are unrelated to racial discrimination or retaliatory discrimination resulting from his EEOC charge. Such broad allegations beyond the scope of Title VII are inappropriate. 42 U.S.C. § 2000e-2; 42 U.S.C. § 2000e-3.

For the above stated reasons the Count 1 is **DISMISSED** as to all individual Defendants. However, plaintiff is **GRANTED** leave to amend Count 1 to state clearly and briefly his allegations against Defendant Norfolk Southern.

C. Counts 2, 3, and 4.

Count 2 is a claim under §§ 1981 and 1983 of the Civil Rights Act of 1866, Count 3 is a claim under §§ 1981(b) and 1983 of the Civil Rights Act of 1866, and Count 4 is a claim under §§ 1983 and 1988 of the Civil Rights Act of 1866

To state a claim under 42 U.S.C. § 1983 plaintiff must claim that the defendant acted "under color of any statute, ordinance, regulation, custom, or usage, of any State of Territory or the District

of Columbia. 42 U.S.C. § 1983; West v. Atkins, 487 U.S. 42, 48 (1988). Scott claims that Norfolk Southern's "railroad police agents" acted under color of state law. Scott's sole allegation involving these police agents is that they assaulted him. (Complaint at ¶ 220-227.) These allegations of assault do not have anything to do with Scott's cause of action asserted in Counts 2, 3, and 4, nor is it clear who these agents work for or what railroad police agents are.

Furthermore, the statute of Limitation under 42 U.S.C. § 1981 is two (2) years. Patterson v. American Tobacco Company, 535 F.2d 257 (4th Cir. 1976). Scott's EEOC charge and subsequent Title VII lawsuit alleged male-on-male sexual harassment. Scott has not alleged that he was the victim of racial discrimination within the two year Statute of Limitation.

For the above stated reasons, Counts 2, 3, and 4 are **DISMISSED.**

D. Count 5.

Count 5 is a claim under the Commonwealth of Virginia's Discrimination Statute. The Court presumes that when Scott refers the Virginia Discrimination Statute he is referring to the Virginia Human Rights Act, Va. Code § 2.1-714 (Michie 1995). This act only creates a private cause of action if the employer employs between five (5) and fifteen (15) employees. Va. Code § 2.1-725. Norfolk Southern employs far more than fifteen (15) employees.

Therefore, Count 5 is **DISMISSED.**

E. COUNTS 6, 7, 8, and 9.

Counts 6, 7, 8, and 9 allege violations of Article 4, and the First, Fifth and Fourteenth Amendments to the United States Constitution. Scott must invoke 42 U.S.C. § 1983 to enforce these provisions of the Constitution. As with Counts 2, 3, and 4 above,

Scott has failed to claim that Defendants acted "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia" as is required to state a 42 U.S.C. § 1983 claim. 42 U.S.C. § 1983; West v. Atkins, 487 U.S. 42, 48 (1988).

For this reason Counts 6, 7, 8 and 9 are **DISMISSED.**

F. Counts 10, 11, 12, 13, 14, and 15.

Count 10 is a claim under the Civil Rights Act of 1866 and 42 U.S.C. § 1985(2), Count 11 is a claim under the Civil Rights Act and 42 U.S.C. § 1985(3), Count 12 is a claim under the Civil Rights Act of 1866 and 42 U.S.C. § 1986, Count 13 is a claim under the Commonwealth of Virginia Conspiracy Act, Count 14 is a claim under the Federal Conspiracy Act of 1861.

The Federal Ku Klux Klan Act of 1871, and the Federal Conspiracy Act of 1861 have been codified at 42 U.S.C. §§ 1985, 1986. Under 42 U.S.C. § 1985 Scott must allege that:

> Two or more persons . . . conspire[d] to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matters pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified . . .

42 U.S.C. § 1985. Under 42 U.S.C. § 1986 Scott must allege that the Defendants:

> Who. having knowledge that any of the wrongs conspired to be done, and mentioned in the preceding section [42 U.S.C. § 1985], are about to be committed, and having

> the same, neglects and refuses to do so, if such wrongful acts be committed, shall be liable to the party injured."

42 U.S.C. § 1986.

Scott has not stated a claim under these statutes because he has not properly pleaded a conspiracy. Scott has only made conclusory allegations that Defendants harassed Scott and intimidated Scott's friends so they would not testify at his previous trials. Scott has not alleged any agreement or other acts committed in furtherance of the conspiracy so these conspiracy claims are deficient. Buschi v. Kirven, 775 F.2d 1240, 1248 (4th Cir. 1985). Thus Claims 10, 11, 12, 14, and 15 are **DISMISSED.**

As for Count 13, the Court assume that Scott is referring to Virginia Code § 18.2-499, -500 (Michie 1996), when he invokes the Virginia Conspiracy Act. This Act applies only to harm done to businesses. Because Scott has not alleged such a harm, Count 13 is **Dismissed.**

G. Count 16.

Count 16 is a claim for negligent supervision under the Federal Employer's Liability Act ("FELA"), the Federal Railroad Safety Act ("FRSA") and Virginia common law.

Scott alleges that certain individual Defendants were guilty of negligent supervision in connection with Norfolk Southern, violations of Title VII. Only common carriers are liable under FELA. 45 U.S.C. § 51. "Common carriers" has been defined as one who operates railroads. Wells Fargo & Co. v. Taylor, 254 U.S. 175 (1920). Therefore, Plaintiff's negligent supervision claims under FELA are **DISMISSED.**

There is no private cause of action under the FRSA. 49 U.S.C. § 20109; Abate v. Southern Pacific Transp. Co., 928 F.2d 167, 160-

70 (5th Cir. 1991). For this reason the FRSA claims against all of the Defendants are **DISMISSED.**

Additionally, Virginia does not recognize a cause of action for negligent supervision of employees. Chesapeake and Potomac Tel. Co. v. Dowdy, 235 Va. 55 (1988). Therefore, Count 16 is **DISMISSED.**

H. Count 17 and 18.

Count 17 is a claim for defamation, libel and slander under 42 U.S.C. § 1983, and Count 18 is a conspiracy claim for defamation, libel, and slander under 42 U.S.C. § 1985(3).

Scott must allege the following for a claim of defamation, libel, and slander: "[F]irst, that the publication is both false and derogatory in nature and , second, that a third party would believe such to be true of the plaintiff, thus injuring plaintiff's reputation within the community." Falwell v. Penthouse Intern., Ltd., 521 F. Supp. 1204, 1208 (W.D. Va. 1981). Scott has failed to allege that there was any publication. Scott claims that his letter of dismissal and other written statements were issued by Defendants, but Scott does not state to whom they were issued.

As previously discussed in connection with counts 10, 11, 12, 13, 14 and 15, Scott has failed t properly plead a conspiracy. Because Scott has failed to properly plead conspiracy and publication, Counts 17 and 18 are **DISMISSED.**

I. Counts 19 and 20.

Count 19 is a claim for Constitutional invasion of privacy under 42 U.S.C. § 1983, and Count 20 is a claim for invasion of privacy conspiracy under 42 U.S.C. § 1983.

As with Count 2, 3, 4, 7, 8, and 9 above Scott has failed to plead facts showing that Defendants acted "under color of any

statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia" as required under 42 U.S.C. § 1983. West v Atkins, 487 U.S. 42, 48 (1988).

Counts 19 and 20 are **DISMISSED.**

J. **Count 21.**

Count 21 is a claim for breach of contract.

This claim is nothing more than a restatement of Scott's other claims in this case. Scott alleges that several federal laws were implied provisions of his oral contract, and that when Norfolk Southern violated these law, they breached Scott's contract. Contracts that cannot be performed within one (1) year must be in writing under the Statute of Frauds. Therefore, Count 21 is **DISMISSED.**

K. **Counts 22.**

Count 22 is a claim of liability for personal injuries under the FELA. Only common carriers are liable under the FELA. 45 U.S.C. § 51. "Common carriers" has been defined as one who operates railroads. Wells Fargo & Co. v. Taylor, 254 U.S. 175 (1920). The FELA claim against the individual Defendants is **DISMISSED.**

As to Norfolk Southern, their Motion to Dismiss Count 22 is **DENIED.** Additionally, the Court **GRANTS** plaintiff leave to amend Count 22 so as to clearly and briefly state the cause, extent and date of his injuries..

L. **Counts 23 and 24.**

Count 23 is a claim of liability for personal injury under FRSA.

As stated above, there is no private cause of action under the FRSA. 49 U.S.C. § 20109; Abate v. Southern Pacific Transp. Co., 928 F.2d 167, 169-70 (5th Cir. 1991). Furthermore, the FELA claim is identical to Count 22. Therefore, Count 24 is **DISMISSED.**

N. Counts 25, 26, 27, and 28.

Count 25 is a claim of intentional infliction of emotional distress under the FELA and the FRSA, Count 26 is a claim of intentional infliction of emotional distress, Count 27 is a claim of negligent infliction of emotional distress under the FELA and the FRSA, and Count 28 is a claim of negligent infliction of emotional distress.

Claims under FRSA in Counts 25 and 27 are **DISMISSED** because FRSA does not give rise to a private cause of action. See discussion infra section II-G and II-K. Claims 25 and 27 under the FELA against the individual defendants are **DISMISSED** because the FELA does not apply to individual Defendants. See discussion infra section II-G and II-K.

However, Scott is **GRANTED** leave to amend his FELA and common law claims for negligent and intentional infliction of emotional distress against Norfolk Southern. Plaintiff must clearly and briefly state the specific conduct of Norfolk Southern that give rise to these claims, and when such conduct occurred.

O. Count 29.

Count 29 is a claim of wrongful termination and wrongful discharge. Scott claims that he was terminated for filing suit against Norfolk Southern. The Commonwealth of Virginia does recognize causes of action for wrongful discharge in violation of pubic policies expressed in state statutes. Miller v. SEVAMP, 234 Va. 462, 468, 362 S.E.2d 915, 919 (1987); but see Magnuson v. Peak Technical Services, Inc., 808 F. Supp. 500 (E.D. Va. 1992) (no generalized cause of action for retaliatory discharge).

Defendants' Motion to Dismiss Count 29 is **DENIED** and plaintiff is **GRANTED** leave to amend Count 29. However, the Court will not necessarily exercise supplemental jurisdiction over this claim.

P. Count 30.

Count 30 is a claim of assault and battery.

Scott claims that on February 15, 1996, he observed unidentified railroad police agents and private investigators watching his home. Scott alleges that these men assaulted him. Scott further claims that these men were acting under the direction of Norfolk Southern.

For an employer to be held liable under the theory of respondeat superior the employee must have been performing his employer's business and acting within the scope of his employment. Kensington Associates v. West, 234 Va. 430, 432, 362 S.E.2d 900, 901, (1987) (citing McNeil v. Spindler, 191 Va. 685, 694, 62 S.E.2d 13, 17 (1950)). "When an employer-employee relationship has been established, 'the burden is on the [employer] to prove that the [employee] was *not* acting within the scope of his employment when he committed the act complained of.'" Kensington Associates, 234 Va. at 432-33 (citations omitted) (quotes, brackets, and italics in original).

Defendants point out the Plaintiff has admitted that these employees were "acting out of personal motive beyond the scope of their Norfolk Southern employment with the assault and battery of Scott." (Pl's Mot. in Opp'n Mot. dismiss. at 22.) However, because Plaintiff is preceding pro se, this admission will be overlooked. Defendants' Motion to Dismiss Count 30 is **DENIED** and the Courts **GRANTS** the Plaintiff leave to amend Count 30.

O. Counts 31 and 32.

Count 31 is a claim under the Employment Retirement Income Security Act ("ERISA"), and Count 32 is a claim of breach of fiduciary duty.

ERISA prohibits an employer from terminating an employee for the purpose of interfering with the employee's ERISA rights. 29 U.S.C. § 410. In Conkwright v. Westinghouse Elec. Corp., 933 F.2d 231 (4th Cir. 1991), the Fourth Circuit Court of Appeals held that "one must prove a specific intent of the employer to interfere with an employee's pension rights" to sue for wrongful termination under ERISA. Scott has not specifically pled this element and it cannot be inferred from Norfolk Southern's actions. Therefore, Count 31 is **DISMISSED.**

Scott claims that he has been denied benefits and this denial is actionable under 29 U.S.C. 1132(a)(1)(B). "An ERISA claimant generally is required to exhaust the administrative remedies provided in his or her employee benefit plan before commencing an ERISA action in Federal Court." Hickey v. Digital Equipment Corp., 43 F.3d 941 (4th Cir. 1995) (citation omitted). Because Scott has not exhausted his administrative remedies, Count 32 is **DISMISSED.**

III. Defendant's Motion for Injunction.

Defendants have moved to enjoin Plaintiff from filing any further pleadings, motions, discovery or briefs with this Court until all outstanding motions have been ruled upon. While the Court is concerned that the Plaintiff's prodigious motions and pleadings have gone well beyond any reasonable bounds, the Court **FINDS** that it cannot enjoin Plaintiff from submitting additional motions or pleadings to the Court. However, the Court **ORDERS** that Defendants are not required to respond to any subsequent filings by the plaintiff until so ordered by the Court.

III. CONCLUSION.

For the above stated reasons, all claims against individual defendants are **DISMISSED.** The Court **GRANTS** Plaintiff leave to amend his claims against Norfolk Southern as to Counts 1, 22, 26, 28, 29, 30 and the FELA claims of count 25 and 27. All other claims are **DISMISSED.** Plaintiff's amended Complaint may be filed no later than August 19, 1996. Norfolk Southern response may be filed no later than September 3, 1996.

The Court **REQUESTS** the Clerk mail a copy of this Order to Plaintiff and counsel for Defendants.

It is so **ORDERED.**

/s/ Henry Coke Morgan, Jr.

UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
August 14, 1996

APPENDIX D

OPINION AND ORDER OF THE

UNITED STATES DISTRICT COURT

DENYING PETITIONER TO CLAIM THAT THE TRANSFER

HARASSMENT AND DISCHARGE WERE ACTS OF TITLE

RETALIATION AND DONE BECAUSE OF HIS BLACK RACE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

FILED FEBRUARY 5, 1997
CLERK, U.S. DISTRICT COURT
NORFOLK, VA

MICHAEL A. SCOTT,

Plaintiff,

v. Action No. 2:96cv257

NORFOLK SOUTHERN CORPORATION,

Defendant.

OPINION AND ORDER

Plaintiff, Michael A. Scott ("Scott"), filed suit against his former employer, Norfolk Southern Corporation ("NS"), alleging thirty-two counts arising from his employment with NS. On August 5, 1996, the Court dismissed twenty-four (24) of the thirty-two (32) counts alleged in Scott's Third Amended Complaint. The Court granted Scott leave to amend his remaining claims so that each states a cause of action. On August 16, 1996, Scott timely filed his Fifth Amended Complaint.[1] On September 3, 1996, NS filed an answer to Scott's Fifth Amended Complaint. On December 16, 1996, NS filed Motions to Dismiss and for Summary Judgment, as well as affidavits, exhibits, and a notice of motions to pro se plaintiff. Scott filed a brief in opposition, exhibits, and an affidavit on January 3, 1997, and NS filed a reply brief on January 8, 1997.

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[1] Scott's Fourth Amended Complaint was attached to his Fourth Motion to Amend, which the Court denied on June 6, 1996.

Scott's Fifth Amended Complaint consists of the following eight counts: Count One (1), Title VII racial discrimination and retaliation for Scott's previous Equal Employment Opportunity Commission ("EEOC") charge and lawsuits against NS and its agents; Count Two (2), personal injury under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 et seq.; Count Three (3), common law assault and battery; Count Four (4), Virginia common law wrongful discharge; Count Five (5), intentional infliction of emotional distress under FELA; Count Six (6), negligent infliction of emotional distress under FELA; Count Seven (7), Virginia common law intentional infliction of emotional distress; and Count Eight (8), Virginia common law negligent infliction of emotional distress. In addition to the briefs, affidavits, and exhibits submitted by the parties, the Court also heard oral arguments and testimony from Scott at the January 28, 1997, hearing on defendant's motions.

Scott was hired by NS as a Management Trainee on August 16, 1985. Scott was a Mechanical Foreman at NS Lambert Point Coal Piers from March, 1993, through February 16, 1996, the date of his discharge. During the term of Scott's employment with NS, he was twice promoted and transferred on four occasions, twice requiring a change of residence. Scott filed a lawsuit against NS alleging male-on-male sexual harassment, and in December 1995, a jury returned a verdict in his favor. On January 5, 1996, one month after the jury verdict, NS offered Scott $70,000 in exchange for his resignation and release of any additional legal claims against NS. Scott declined NS's offer.

While employed at the Coal Piers, Scott, an African-American male, alleges that he was harassed and threatened because of his race. He also alleges that he had a slip-and-fall accident resulting in injuries to his back and shoulders on February 8, 1996. On February 16, 1996, NS terminated Scott for allegedly filing an untimely and potentially false injury report.

The facts forming the basis of each of Scott's claims will be discussed in greater detail as the Court addresses the defendant's motions regarding those claims.

I. Standard for Summary Judgment

Summary judgment under Rule 56 is appropriate only when the court, viewing the record as a whole and in the light most favorable to the nonmoving party, determines that there exists no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. See, e.g., Celotex Corp. v. Catrett, 477 U.S. 317, 322-24 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-50 (1986); Terry's Floor Fashions, Inc. v. Burlington Indus., Inc., 763 F.2d 604, 610 (4th Cir. 1985). Once a party has properly filed evidence supporting the motion for summary judgment, the nonmoving party may not rest upon mere allegations in the pleadings, but must instead set forth specific facts illustrating genuine issues for trial. Celotex Corp., 477 U.S. at 322-24. Such facts must be presented in the form of exhibits and sworn affidavits. Failure by plaintiff to rebut defendants' motion with such evidence on his behalf will result in summary judgment when appropriate. "[T]he plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322.

II. Analysis.

Count One (1) Title VII Claims.

Scott alleges that because of his race, he was (1) not equally compensated, (2) not promoted, (3) harassed, and (4) discharged. He also claims that NS proposed to transfer him to Decatur, Illinois in retaliation for Scott's EEOC charges and related lawsuits. The Court will address each claim in turn.

a. Equal Compensation and Promotion.

Defendant seeks summary judgment as to Scott's Title VII equal compensation and promotion claims because (1) Scott has not exhausted his administrative remedies, and (2) these claims are untimely.

Claims in a Title VII lawsuit must have been included in an EEOC charge or be reasonably related to the allegations set forth in an EEOC charge. Nicol v. Imagematrix, Inc., 767 F. Supp. 744, 753 (E.D. Va. 1991). "[T]he critical question is whether the claims set forth in the civil complaint come within the scope of the EEOC investigation which can reasonably be expected to grow out of the [EEOC] charge of discrimination?" Powers v. Grinnell Corp., 915 F.2d 34, 38-39 (1st Cir. 1990); see also Nicol, 767 F. Supp. at 753.

In Scott's EEOC charge filed March 6, 1996, he alleges that NS retaliated against him as a result of his January 1995, EEOC charge and subsequent lawsuit. Scott further alleged that he was harassed, transferred, and discharged as a result of his race. Additionally, Scott makes general allegation that all minorities have been excluded from certain position at NS. However, no where in his EEOC charge does Scott allege that he was past over for promotions or unfairly compensated because of his race. Accordingly, the Court **FINDS** that the allegation contained in Scott's EEOC charge would not reasonably lead to an investigation of the compensation and promotion claims alleged in Scott's Fifth Amended Complaint.

Moreover, even if Scott had alleged discriminatory compensation and promotion claims in his EEOC charge, these claims would be barred as untimely. Under Title VII, a charge of discrimination must be filed with the EEOC within 300 days after the alleged unlawful practice. 42 U.S.C. § 20003-5 (1996). The filing requirement is "akin to a statute of limitations period and failure to meet the deadline renders the discriminatory occurrence without

legal consequences." Williams v. Enterprise Leasing Co. of Norfolk/Richmond, 911 F. Supp. 988 (E.D. Va. 1995)(citations omitted). The equal compensation and promotion allegations in Scott's complaint occurred long before the 300 day limitation period.

Nevertheless, Scott seeks to salvage these stale claims by arguing that the discriminatory acts continued to a point within the 300 day period prior to the filing of his EEOC charge. This court has recognized a continuing violation doctrine where at least one of the alleged violations has occurred within the applicable time period. Id. at 995. This Court has adopted a three factor test to determine the applicability of the continuing violation doctrine: "(1) whether the alleged acts involve the same type of discrimination; (2) whether the alleged acts are frequent; and (3) whether the alleged acts have a degree of performance which would trigger an employee's awareness and duty to assert his or her rights." Id. at 996. (citations omitted). The third and most important factor precludes use of the doctrine where the stale acts were so adverse and visible as to "put a reasonable employee on notice of the alleged discriminatory animus." Id. Where the Plaintiff claims stale acts as part of a "continuing violation plaintiff must at the very least show that he or she failed to perceive the alleged discriminatory animus causing the claimed injury prior to the statutory period, and that such recognition would not reasonably have occurred until a point in time within the statutory period." Id.

In the case at hand, Scott admits that he knew of these claims early on and felt that NS's actions were racially motivated when they first occurred. (Scott Dep. at 48-54, 66-81, 116-130.) Accordingly, the Court **GRANTS** NS's summary judgment motion and **DISMISSES** Scott's equal compensation and promotion claims.

b. Racial Harassment and Discharge.

In order to establish a prima facie case of a racially hostile working environment, the allegations must be so severe or

pervasive as to alter the conditions of employment. Meritor Sav. Bank F.S.B. v. Vinson, 477 U.S. 57, 66 (1986). "The existence of a hostile work environment cannot be predicated upon acts that are isolated or genuinely trivial." Carter v. Ball, 33 F.3d 450, 461 (4th Cir. 1994). In order to hold NS liable for the acts of its employees, Scott must also demonstrate that NS had actual or constructive knowledge of the predicated acts. Id.

Scott alleges that Wayne F. Henley, a fellow Mechanical Foreman, used racial epitaphs while threatening Scott's life on more than one occasion. At the January 27, 1996, hearing Scott testified that Clemmer threatened that if he caught Scott at the Coal Pier at night, "he was going to kick his black ass," or words to that effect. Scott also alleges that Jerry W. Clemmer, another Mechanical Foreman, repeatedly told Scott that he was an "incompetent black engineer." Finally, Scott maintains that his supervisors, Goode, Tobias, Manetta, Heilig and Hale targeted his projects for special scrutiny and criticism because of his race.

In order to establish that NS had knowledge of these acts, Scott must demonstrate that he complained to NS or that the harassment was so pervasive that the employer's awareness may be inferred. Swintek v. US Air, Inc., 830 F.2d 552, 558 (4th Cir. 1987). Scott stated at his deposition that he made complaints concerning racial harassment to Jeff Pair, Scott's direct supervisor at the Coal Piers. (Scott Dep. at 92.)

Scott's other allegations of harassment consisting largely of claims of increased workload and supervisor scrutiny of his work assignments. Scott directs the Court's attention to a work schedule for NS's employees at the Coal Pier. (Pl.'s Ex. 12.) The schedule indicates that 35 projects were assigned to Scott, but only 22 projects were assigned to Clemmer, the other Mechanical Foreman. (Id.) Scott states that the increased workload and supervision coincided with his complaints of harassment to Jeff Pair. The Court cannot say at this time that Scott has failed to present a genuine

issue of material facts as to his claim of racial harassment. Accordingly, NS's motion for summary judgment as to Scott's racial harassment claim is **DENIED.**

Scott has also alleges that his discharge was racially motivated.[2] According to NS, Scott was terminated for "conduct unbecoming a supervisory employee in connection with an injury which he allegedly sustained on February 8, 1996." (Heilig Aff. ¶ 12.) Specifically, NS maintains that Scott filed a untimely and potentially false report of an injury received on February 8, 1996.

Scott alleges that he was injured in a slip-and-fall around 5:00 p.m. on February 8, 1996. Scott states that he did not realize that he was injured until 1:00 a.m. on February 9, 1996. Scott alleges that he reported this injury to Pair by a letter he dropped into Pair's mailbox around 8:00 a.m. on February 9, 1996. (Scott Aff. ¶ 17) Scott also alleges that he told Pair he was going home around 4:00 p.m. on February 9, 1996, because of back pain and headaches, but did not discuss the slip-and-fall at that time. (Id.)

NS points to the affidavit of Timothy A. Heilig, NS's Director of Mechanical Maintenance, in which he states that Pair did not receive Scott's written injury report until Monday, February 12,

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[2] In Scott's brief in opposition to the defendant's motion for summary judgment, and at the January 28, 1997, hearing, Scott also argued that his termination was in retaliation for filing charges with the EEOC and related lawsuits, and that his transfer was racially motivated. This Court has granted Scott numerous opportunities to amend his complaint. Nevertheless, Scott has never made such allegations in any of his amended complaints. Accordingly, the Court will not allow him to advance these new theories at this late stage of the proceedings.

1996. Heilig thus considered the report to be untimely. (Heilig Aff. ¶ 22.) Heilig began an investigation of the injury which revealed that no one saw Scott fall or saw any indications that he was injured on February 8 or 9, 1996. (Id. ¶ 19.)

NS's safety rules require that an employee injured at work must report the injury to his supervisor before leaving the premises. (Pl.'s Ex. 9.) However, Scott has alleged that he did not know he was injured until early in the morning of February 9, 1996.

While NS has proffered a legitimate reason for the termination, the facts presented by Scott create a genuine dispute as to the reasons for NS's termination of Scott. In cases such as this, where the motive and credibility of the witnesses is at issue, summary judgment is seldom appropriate. See Charbonnages de France v. Smith, 597 F.2d 406, 414 (4th Cir. 1979). Accordingly, NS's motion for summary judgment as to Scott's Title VII claim of racially motivated discharge is **DENIED.**

c. Retaliatory Transfer.

To establish a prima facie case of retaliation Scott must prove: (1) he engaged in protected activity; (2) NS took adverse employment action against him; and (3) a causal connection existed between the protected activity and the adverse action. Ross v. Communications Satellite Corp., 759 F.2d 355 (4th Cir. 1985). If Scott establishes a prima facie case, the employer may offer legitimate reasons for its action. Scott however, has the ultimate burden of proving that the employer's reasons are pretextual. Egbuna v. Time-Life Libraries, Inc., 95 F.3d 353, 355 (4th Cir. 1996).

Scott's 1995 and 1996 EEOC charges and Scott I, the lawsuit based upon the allegations in his 1995 EEOC charge, are protected activities. Three weeks after the conclusion of the trial in Scott I, NS offered Scott $70,000 to resign and release any legal claims. Scott

rejected NS's offer. Scott did not wish to be transferred and he had made his wishes known to his employer on two job performance appraisal forms. (Scott Aff. ¶ 64) (Pl.'s Ex. 6, 7.) Nevertheless, on January 10, 1996, NS initiated the paperwork necessary to transfer Scott to Decatur, Illinois effective February 16, 1996. (Pl.'s Ex. 14.) In fact, Scott was never transferred because he was terminated on February 16, 1996.

NS maintains that this transfer was neither retaliatory, nor was it an adverse employment action. While Scott's salary and responsibilities may not have suffered may not have suffered as a result of his transfer, Title VII does not limit adverse job action to loss of pay or responsibility. See Collins v. State of Illinois, 830 F.2d 692 (7th Cir. 1987) (citations omitted). Scott had indicated to his employer that he did not wish to be transferred. The crucial issue in this claim is the motivation behind NS's decision to transfer Scott. "Summary Judgment is seldom appropriate in cases wherein particular states of mind are decisive as elements of a claim or defense. Charbonnages de France, 597 F.2d at 414 (citation omitted). Provided that the transfer was an adverse employment action, the close proximity in time between the conclusion of the trial in Scott I, Scott's refusal to resign, and NS and NS's decision to transfer him are sufficient to establish a genuine dispute as to NS's motivation for the proposed transfer. See Collins, 830 F.2d at 705; DeCintio v. Westchester County Medical Center, 821 F.2d 111 (2nd Cir. 1987), cert. denied, 484 U.S. 965 (1987). Accordingly, NS's motion for summary judgment as to Scott's Title VII claim for retaliatory transfer is **DENIED.**

Count 2: FELA Personal Injury Claim.

Scott alleges that he sustained back and shoulder injuries as a result of a slip-and-fall at Portlock Yard on February 8, 1996. To state a claim under the FELA, Scott must include all the elements of a common law negligence action. Brown v. CSX Transp., Inc., 18 F.3d 245 (4th Cir. 1994). The issue is one for the jury if Scott

establishes that his employer's "negligence played any part, even the slightest, in producing the injury or death for which damages are sought." Id. at 248 (citing Rogers v. Missouri Pac. R.R. Co., 352 U.S. 500, 506 (1957)). The employee's contributory negligence is not bar to recovery; damages are simply reduced in proportion to the employee's negligence. Caillouette v. Baltimore & Ohio Chicago Terminal R.R. Co., 705 F.2d 243, 246 (7th Cir. 1983). Scott has the burden of showing that with the exercise of due care NS could have prevented the slip-and-fall.

On February 8, 1996, Scott and Cramer were at the NS intermodal ramp in Chesapeake, Virginia inspecting fuel storage tanks. According to Scott, Cramer went to his car to get a camera and was not present at the time of Scott's fall. Scott observed water leaking out of a small hole in the side of a containment dike. Scott noted a sheen on top of the resulting puddle, and now believes that this sheen was diesel fuel floating on tip of the water puddle. As Scott approached the containment dike to inspect the leak, he alleges that he slipped on a small bolt lying in the puddle and fell.

Because of icy conditions, Henley had instructed all Mechanical Department personnel, including Scott, to wear "Ice Creepers" (rubber slip-on spikes worn over shoes) when working outside to guard against slipping on the ice. Ice Creepers contain a manufacturer's warning indicating that they are not intended for "walking on concrete, cement, or other hard paved surfaces" and that so doing may increase you risk of injury. (Pl.'s Ex. 15.) Scott states in his affidavit that Clemmer's issued his instruction to wear Ice Creepers during a morning safety meeting. At this meeting Scott maintains that union employees discussed the product's warning and their concerns about wearing the Ice Creepers on ice-free surfaces. Nevertheless, Scott alleges that NS required him to wear Ice Creepers on paved ice-free surfaces, despite the product's warning, and that this negligently contributed to his accident.

In a memorandum prepared by Pair as part of his investigation of Scott's accident, he stated that when he inspected the area on February 12, 1996, "[t]he area possessed debris, trash, and uncoiled hoses." (Pl.'s Ex. 16.) Scott argues that NS should have been aware of the presence of the trash and debris prior to his accident because NS is required to make visual inspections of these aboveground tanks on a daily basis. (Pl.'s Ex. 37 at 12.) Scott states that it appeared that the debris had been in the area for a long time. Scott maintains that the combination of the Ice Creepers, the bolt, and the diesel fuel/water mixture caused him to slip and fall. Scott has presented evidence sufficient to create a genuine dispute as to whether NS's negligence contributed to Scott's injury. Therefore, NS's motion for summary judgment as to Scott's claim for personal injury under the FELA is **DENIED.**

Count 3; Assault and battery.

Scott alleges assault and battery by NS police agents. Scott alleges that NS police agents conducted surveillance of him at his home and followed him around town. NS operates a Police Department with a Special Investigative Unit ("SIU"). (Hanes Aff. ¶ 2.) On February 14 and 15, 1996 a G.L. Hedgepath and a W.D. Catron, agents of the SIU, conducted surveillance of Scott as part of an investigation into what NS believed was a fraudulent injury claim. (Id.) Scott alleges that he approached the surveillance Van to write down its license plate numbers. While examining the taillight for a vehicle year identification, Scott alleges that Catron physically shoved him backwards warning, "don't get to close to his damn van [sic]. I'll kick your black ass [sic]." (T. 355) Scott maintains that his back injury was exacerbated when Catron pushed him.

In order for Scott to recover for his claim of assault and battery alleged in Count 3 he must establish that NS is vicariously liable for the predicate acts of its employees. In Virginia, an act is with the scope of employment if:

> (1) it was expressly or impliedly directed by the employer, or is naturally incident to the business, and (2) it was performed, although mistakenly or ill-advisedly, with the intent to further the employer's interest, or from some impulse or emotion that was the natural consequence of an attempt to do the employer's business, and did not arise from some external, independent, and personal motive on the part of the [employee] to d the act upon his own account. When an employer-employee relationship has been established, the burden is on the employer to prove that the employee was not acting within the scope of employment when he committed the act complained of, and if the evidence leave the question in doubt it becomes an issue to be determined by the jury.

Kensington Assoc. v. West, 234 Va. 430, 432-433 (1987) (internal quotations and citations omitted).

Scott does not argue that Catron was authorized to assault him, rather Scott maintains that Catron's conduct, while ill-advised, was intended in part to further his employer's purpose.

> "Anger, malice, vindictiveness, - frailties of human nature, - are among the risks imposed upon the master in the employment of his servants. When these emotions are indulged by the servant, even to the extent of committing a wilful tort, if the ultimate purpose to be thereby attained is in furtherance of the servant's duties entrusted to him, the master is liable for the resultant damage."

Tri-State Coach Corp. v. Walsh, 188 Va. 299, 305 (1948). Whether Catron was motivated to further NS's interests, or from some impulse which grew naturally from his attempt to perform NS's business, will turn on the credibility of the witnesses and the intent of the actors. Therefore, NS's motion for summary judgment is **DENIED** as to Scott's claim for assault and battery.

Count 4; Virginia Wrongful Discharge.

The defendant maintains that Scott's claim for wrongful discharge under Virginia common law fails to state a claim upon which relief can be granted. Virginia recognizes a cause of action for wrongful discharge in violation of the Commonwealth's public policy as embodied in statutes. In Lockhart v. Commonwealth Educ. Systems Corp., 247 Va. 98 (1994), the Virginia Supreme Court recognized that the Virginia Human Rights Act enunciates the Commonwealth's public policy against race and gender discrimination in employment. The Court has recently reaffirmed the principle expressed in Lockhart, that a cause of action for wrongful discharge based on race or gender discrimination arises not from the Virginia Human Rights Act itself, but from the Act's statutory embodiment of the public policy of the Commonwealth. Bailey v. Scott-Gallaher Inc., -- Va. --, 1997 WL 15271 *1, *2-*4 (Va., Jan. 10, 1997). Therefore, defendant's motion to dismiss Scott's common law wrongful discharge claim is **DENIED.**

Counts 5 and 6; Intentional and Negligent Infliction of Emotional Distress under FELA.

Under FELA, the "zone of danger test" is applied to determine whether an emotional injury is cognizable. Consolidated Rail Corp. v. Gottshall, 512 U.S. 532 (1994). Under this test, an emotional injury claim is cognizable only if the plaintiff sustains a physical impact or is placed at risk of imminent physical harm because of the defendant. Id. at 545.

To the extent that Scott relies upon the facts alleged in his assault and battery claim in Count Three (3), the alleged assault and battery occurred outside the scope of Scott's employment and therefore is not actionable under the FELA. Any claim for intentional or negligent infliction of emotional distress based upon the same set of facts are subsumed by Count Three (3).

Scott alleges that he has sustained a stress related physical impact in the form of "hemorrhoids and stool bleeding." (Scott Aff. ¶ 73, Pl.'s Ex. 39.) Scott alleges that his hemorrhoids are a direct and proximate result of NS negligence. However, Scott has not produced any evidence that his hemorrhoids have been caused by the actions of NS. Scott has produced only a medical report indicating that Scott complained of hemorrhoids to his doctor. (Pl's Ex. 37.) Nothing in the medical report indicated that the doctor even verified Scott's diagnosis of hemorrhoids, much less express an opinion that Scott's hemorrhoids were related to the actions of Scott's employer.

Therefore, the Court **GRANTS** the defendant's motion for summary judgment as to Counts 5 and 6.

Counts 7 and 8; Intentional and Negligent Infliction of Emotional Distress under Virginia Common Law.

Scott is entitled to seek damages for emotional distress resulting from the alleged assault and battery in Count Three (3). To the extent that he seeks to advance a separate claim for intentional infliction of emotional distress based upon his other allegations of racial harassment, Virginia requires that: (1) the conduct must be intentional or reckless; (2) the conduct must be outrageous and intolerable in that it offends generally accepted standards of decency and morality; (3) a causal connection must exist between the wrongful conduct and the emotional distress; and (4) the emotional distress suffered must be severe. Womack v. Eldridge, 215 Va. 338 (1974).

None of the other alleged acts attributable to NS rise to the level outrageousness and intolerableness required to state a claim for intentional infliction of emotional distress.

In order to establish a claim for negligent infliction of emotional distress, Scott must demonstrate some physical injury as a direct

and proximate result of the defendants negligence. Myseros v. Sissler, 239 Va. 27 (1973). As previously stated, Scott has presented no evidence that his hemorrhoids have been caused by the actions of NS. Scott has produced only a medical report indicating that Scott complained of hemorrhoids to his doctor. (Pl.'s Ex. 37.)

Accordingly, NS motion for summary judgment as to Counts 7 and 8 are **GRANTED** and the claims are **DISMISSED.**

III. Conclusion.

The defendant's motion for summary judgment as to Scott's Title VII equal compensation and promotion claims in Count One (1), and Counts Five (5), Six (6), Seven (7), and Eight (8) is **GRANTED** and the Court hereby **DISMISSES** these claims. As to all other counts, the defendants motion for summary judgment is DENIED. Additionally, defendant's motion to dismiss Count Four (4) is **DENIED.**

The Clerk is **REQUESTED** to send a copy of this Order to plaintiff and counsel for defendant.

It is so **ORDERED.**

/s/ Henry Coke Morgan, Jr.

HENRY COKE MORGAN, JR
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
February 5, 1997

APPENDIX E
PETITIONER'S CHARGE OF DISCRIMINATION FILED WITH THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

CHARGE OF DISCRIMINATION

AGENCY EEOC
CHARGE NUMBER 121960256

Virginia Council On Human Rights and EEOC

Mr. Michael A. Scott (804) 495-0844
4753 Longmont Road, Virginia Beach, VA 23456-5017 11/14/61

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME

RESPONDENT
Norfolk Southern Corporation Cat D (501+) (804) 629-2600
Three Commercial Place, Norfolk, VA 23514 County 710

CAUSE OF DISCRIMINATION BASED ON
RACE, RETALIATION

THE PARTICULARS ARE

1. I was hired by the Respondent on August 16, 1985 as a Management Trainee. I filed a charge of discrimination with the EEOC during January, 1995 against the Respondent and afterwards I was harassed through increased work load and close scrutiny. During the court action involving my charges, I was told to resign as part of settlement or be sent to some place I did not like. After the court proceedings, I was told of my job abolishment and mandatory transfer on February 7, 1996 and to report to work in Decatur, Illinois on February 16, 1996. I was discharged from the position of Mechanical Foreman on February 16, 1996.

2. A. L. Luttrell, a White Master Mechanic, stated my job was being abolished as the reason for my transfer. He hand-delivered a letter to my home which stated I had been discharged due to conduct unbecoming a supervisory employee in connection with an injury.

3. I believe I was harassed, transferred, and discharged because of my race, Black, and as an act of retaliation because I filed a charge with the EEOC, all in violation of Title VII of the Civil Rights Act of 1964, as amended.

4. Blacks and other minorities have been excluded from the positions of Master Mechanic and all mechanical positions above Master Mechanic, Assistant Division Engineer and all positions above Assistant Division Engineer, Superintendent and all positions above Superintendent, and General Supervisor Communications and Signals and all positions above General Supervisor Communications and Signals.

I declare under penalty of perjury that the foregoing is true and correct.

March 6, 1996 /s/ Michael A. Scott

APPENDIX F
PETITIONER'S AFFIDAVIT FILED WITH THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

STATE OF VIRGINIA CASE NAME Scott vs. Norfolk Sou
CITY/COUNTY OF Virginia Beach/Virginia Beach
CASE NUMBER 121960256

AFFIDAVIT

I, Michael A. Scott being first duly sworn upon my oath affirm and hereby say:

I have been given assurances by an Agent of the U.S. Equal Employment Opportunity Commission that this Affidavit will be considered confidential by the United States Government and will not be disclosed as long as the case remains open unless it becomes necessary for the Government to produce the affidavit in a formal proceeding. Upon the closing of this case, the Affidavit may be subject to disclosure in accordance with Agency policy.

I am 34 years of age, my gender is Male and my racial identity is Black. I reside at 4753 Longmont Road, City of Virginia Beach, County of Virginia Beach, State of Virginia, Zip Code 23456-5017. My telephone number is (804) 495-0844.

My statement concerns Norfolk Southern Corporation which is located at Three Commercial Place, in Norfolk, Virginia 23514.

My job classification is Mechanical Foreman.

My immediate supervisor is J. E. Pair, Engineer Pier Facilities.

I was hired by the Respondent on August 16, 1985 as a Management Trainee. I filed a charge of discrimination with the EEOC during January, 1995 against the Respondent and afterwards I was harassed through increased work load and close scrutiny. During the court action involving my charges, I was told to resign as part of settlement or be sent to some place I did not like. After the court proceedings, I was told of my job abolishment and mandatory transfer on February 7, 1996 and to report to work in

Decatur, Illinois on February 16, 1996. I was discharged from the position of Mechanical Foreman on February 16, 1996.

A. L. Luttrell, a White Master Mechanic, stated my job was being abolished as the reason for my transfer. He hand-delivered a letter to my home which stated I had been discharged due to conduct unbecoming a supervisory employee in connection with an injury.

A. L. Luttrell told me I was to report to Decatur, Illinois. I felt the transfer was retaliatory as was the job abolishment. J. Scott, a Black, had his job abolished and he was transferred. I do not recall when this occurred.

I was discharged on February 16, 1996 after I was injured by slipping in some diesel fuel. I do not know why my injury was considered misconduct, because it was an accident. I had an injury in 1992 which was not considered misconduct. I do not know why the Respondent is taking this position other than to think it retaliation. R. L. Mago, Filapano; C. D. McGraw and G. N. Doss, both White, had injuries on the job, and they were not discharged.

Last summer, W. F. Henley, a White General Foreman, made threats of violence/bodily harm and death against me because I filed the charge. He was one of the persons I accused concerning sexual harassment. Roger D. Lafon, a White Foreman, witnessed the threat. Henley did not make threats to any other employee to my knowledge.

J. R. Gray, a White Assistant Master Mechanic; D. D. Graab, a White Master Mechanic; J. W. Clemmer, a White General Foreman; and J. E. Pair, a White Engineer harassed me by making accusations that I was not participating with other supervisors, not being a team player with other White supervisors, and not regularly attending safety meetings. I do not have a witness to name for this allegation, because I feel no one will be truthful.

J. W. Clemmer stated I was an incompetent Black Engineer. There was no witness.

I was given more and bigger projects than J. E. Pair, J. A. Scott and J. W. Clemmer to be completed in the same length of time. J. R. Gray gave these assignments through J. E. Pair.

I was followed by private investigators hired by the Respondent. I was able to obtain the evidence to establish I was being followed. I was discharged after I took a letter to J. R. Gray which complained about being followed by the private investigators.

Respondent excludes Blacks and other minorities from the position of Master Mechanic and all mechanical positions above Master Mechanic, Assistant Division Engineer and all positions above Assistant Division Engineer, Superintendent and all positions above Superintendent, and General Supervisor Communications and Signals and all positions above General Supervisor Communications and Signals. Promotions to these positions are done subjectively by recommendation from White male managers. There is no bid system for promotion.

I believe I was harassed, transferred, and discharged because of my race, Black and as an act of retaliation because I filed a charge with the EEOC, all in violation of Title VII of the Civil Rights of 1964, as amended.

I have read and had an opportunity to correct this Affidavit consisting of 3 typed pages and swear that these facts are true and correct to the best of my knowledge and belief.

/s/ Michael A. Scott

Subscribed and sworn to before me
this 6th day of March 1996.
/s/ Ernestine C. Thomas

(3)

No. 98-1138

Supreme Court, U.S.
FILED
FEB 16 1999
CLERK

In The

Supreme Court of the United States

October Term 1998

MICHAEL A. SCOTT,

Petitioner,

v.

NORFOLK SOUTHERN CORPORATION, et. al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the District Court erred in dismissing Scott's § 1981 claim from the Third Amended Complaint based upon the two year statute of limitations.

II. Whether the District Court erred in refusing to permit Scott to assert a Title VII claim for racially motivated transfer and a Title VII claim for retaliatory discharge.

PARTIES TO THE PROCEEDING

Plaintiff in the District Court:

Michael A. Scott

Defendants in the District Court:

Norfolk Southern Corporation
David R. Goode
Stephen C. Tobias
Donald W. Mayberry
Jon L. Manetta
William E. Honeycutt
C. David Vittur
Donald D. Graab
Artis L. Luttrell
Timothy A. Heilig
Lewis D. Hale
Jerry R. Gray
Wayne F. Henley
Jeff E. Pair
Jerry W. Clemmer

Norfolk Southern Corporation owns the common stock of Norfolk Southern Railway Company. The non-wholly-owned subsidiaries of Norfolk Southern Railway Company which may be publicly owned are:

High Point, Randleman, Asheboro and Southern Railroad Company; Mobile and Birmingham Railroad Company; North Carolina Midland Railroad Company; The South Western Railroad Company; The State University Railroad Company; Yadkin Railroad Company

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STATUTORY PROVISIONS INVOLVED IN THE CASE

Petitioner has set out the text of the following statutory provisions:

42 U.S.C. § 1981
42 U.S.C. § 2000e (Title VII)
Fed. R. Civ. P. 8(f)
Fed. R. Civ. P. 10(c)

Respondents set out the text of the following statutory provisions:

Supreme Court Rule 10.

Considerations Governing Review on Certiorari. Review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has

decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Virginia Code §8.01-243.A (Michie 1992).

Personal action for injury to person or property generally; extension in actions for malpractice against health care provider.

A. Unless otherwise provided in this section or by other statute, every action for personal injuries, whatever the theory of recovery, and every action for damages resulting from fraud, shall be brought within two years after the cause of action accrues.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTER-STATEMENT OF CASE

Contrary to Petitioner's Statement of the Case, the Petition for Writ of Certiorari presents two fundamental issues:

(a) Whether petitioner may hide behind his pro se status, given his extensive litigation history;

(b) Whether petitioner may use his pro se status to assert error as a result of the District Court's alleged failure to examine the EEOC charge and affidavit appended as exhibits to his various amended complaints without examining the amended complaints as a whole.

Petitioner, a disgruntled former management employee of Norfolk Southern Corporation ("NS"), asks this Court to grant review of a case in which the jury rendered defense verdicts on claims of racially motivated discharge and racial harassment, sustained on appeal by the Fourth Circuit, and in which the Fourth Circuit remanded the same-gender sexual harassment retaliatory transfer claim [1]. Scott bases his

[1]The District Court had dismissed Scott's claim for retaliatory transfer based upon his January, 1995 same-gender sexual harassment EEOC charge on the ground that, under the Fourth Circuit precedent, his underlying same-gender sexual harassment claim was not cognizable under Title VII. Since then, this Court decided Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998). The Fourth Circuit remanded the retaliatory transfer claim based upon the underlying same-gender

Petition on the generalized allegations of discrimination in the EEOC charge (and affidavit), taken out of the context of his Third Amended Complaint and Fifth Amended Complaint. Significantly, Scott omitted both the Third Amended Complaint and the Fifth Amended Complaint from Petitioner's Appendix, attaching only the EEOC charge and affidavit.[2] Scott's recitation of the procedural history omits and confuses many facts, so respondents restate it.

A. Third Amended Complaint and § 1981 Claim

On March 11, 1996, Scott filed his initial Complaint in this case[3] seeking class certification, $4,000,000.00 compensatory damages, $8,000,000.00 punitive damages and both injunctive and declaratory relief. (Respondents' Appendix B). This case was the fifth of ten lawsuits initiated by Scott since April, 1995 (his third of seven lawsuits as a pro se plaintiff). (Respondents' Appendix A). Scott sued NS and fourteen managers and supervisors, ranging from his former immediate supervisor, Jerry W. Clemmer, to the Chairman and Chief Executive Officer of the corporation. Before defendants had responded, Scott filed a Motion to Amend and Second Amended Complaint (which was permitted as a matter of right, Fed. R. Civ. P. 15(a) and then a Motion to Amend and Third Amended Complaint, which

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sexual harassment charge to the District Court for further proceedings. Defendant has again moved to dismiss the same-gender sexual harassment retaliatory discharge claim because the transfer was cancelled, so no adverse employment action occurred.

[2]Respondents include in their Appendix the full amended complaints with complete attachments, as well as other pertinent exhibits not included in Petitioner's Appendix. Respondents also adopt Petitioner's Appendix A, B,C, and D.

[3]The Complaint, containing 24 counts, consisted of 72 pages and 236 numbered paragraphs.

became operative by District Court Order on May 2, 1996. The Third Amended Complaint[4] sought $4,000,000.00 compensatory damages, $8,000,000.00 punitive damages, and declaratory and injunctive relief. (Respondents' Appendix B). Scott attached eight exhibits to the Third Amended Complaint, including both his March 6, 1996 EEOC charge (Ex. F) and accompanying EEOC affidavit (Ex. G). The defendants filed a motion to dismiss (Respondents' Appendix C) pursuant to Rule 12(b)(6), Fed. R. Civ. P. 12(b)(6), claiming specifically that Scott's § 1981 allegations and claim were barred by the applicable two-year statute of limitations. Va. Code §8.01-243.A (Michie 1992). The defendants asserted that the § 1981 race discrimination allegations in paragraphs 1 through 118, Counts 2 and 3, of the Third Amended Complaint, all occurred more than two years prior to March 11, 1996. The District Court sustained defendants' motion and dismissed the § 1981 claim as being barred by the statute of limitations. At the hearing on defendants' motion to dismiss, the District Court also granted Scott leave to file a Fifth Amended Complaint and instructed him to plead with particularity and specificity the nature of his claims. (Respondents' Appendix H, I). The only issue facing this Court is whether the District Court wholly ignored the general statement in the EEOC charge in light of the very specific allegations of the Third Amended Complaint, in derogation of Rule 10(c), Fed. R. Civ. P. 10(c).

B. Operative Fifth Amended Complaint, Retaliatory Transfer, Racial Discharge

Pursuant to the District Court's August 14, 1996 judgment, opinion and order (Petitioner's Appendix C), Scott filed his Fifth Amended Complaint (Respondents' Appendix

[4]32 counts, 52 pages, 236 numbered paragraphs

D) on August 16, 1996.[5] Unlike the Third Amended Complaint, Scott attached as an exhibit only his EEOC charge (Ex. A.)[6], which contained the general allegation that he was "harassed, transferred and discharged because of my race . . . and as an act of retaliation . . . ." Count 1 of the Fifth Amended Complaint contains two parts: (1) "Title VII - Racial Discrimination," consisting of paragraphs 8 through 32; (2) "Title VII - Retaliation for Previous EEOC Charge," consisting of paragraphs 33 and 34. Based upon the detailed allegations contained in the body of the Fifth Amended Complaint, the District Court restricted Scott to a same-gender sexual harassment retaliation claim based solely upon his transfer, and a racial discrimination claim based upon alleged racial harassment and his discharge on February 16, 1996 (Respondents' Appendix I).

Following denial of defendants' motion to dismiss and for summary judgment (Respondents' Appendix E; Petitioner's Appendix D), the racial harassment and racial discharge claims were tried to a jury in late March and early April, 1997, resulting in a verdict in favor of NS on both claims. (Respondents' Appendix G). At a motion in limine hearing held prior to trial, the District Court dismissed the retaliatory transfer claim based upon Fourth Circuit authority that has since been overruled by this Court in Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998); the Fourth Circuit has remanded the retaliatory transfer claim to the District Court for further proceedings. Therefore, the only issue facing this Court is whether this Court can

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[5]The Fifth Amended Complaint, consisting of 25 pages, 8 counts, and 74 numbered paragraphs, sought $4,000,000.00 compensatory damages, $8,000,000.00 punitive damages, plus class and individual declaratory and injunctive relief. The District Court denied any class action relief.

[6]Contrary to Petitioner's assertion, he did not attach his EEOC affidavit as an exhibit to the Fifth Amended Complaint.

conclude from the record that the District Court ignored the EEOC charge.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. Petitioner's Reliance Upon His Pro Se Status Is Disingenuous

The Petition for Certiorari asserts that, because Scott is a pro se plaintiff, his pleadings are entitled to liberal construction under the holdings of this Court. Given Scott's litigation history (Respondents' Appendix A) and the very voluminous and detailed allegations of both his Third Amended Complaint and Fifth Amended Complaint, Scott's reliance upon his pro se status is not consistent with this Court's liberal pleading standards.

Courts construing this Court's pro se liberal pleading rules have refused to apply those standards to experienced and prolific pro se litigators. See, e.g., Chapman v. Ontra, Inc., No. 96-C-0019, 1997 U.S. Dist. LEXIS 883 (N.D. Ill. June 7, 1997); Ward v. City of Prarie Village, No. 94-4138-SAC, 1995 U.S. Dist. LEXIS 16410 (D. Kan. Sept. 29, 1995). Scott proclaimed himself an "experienced pro se litigator" (Respondents' Appendix F) almost one month before he filed his Complaint, after which he had five opportunities to amend the Complaint. Under even the liberal standards of Haines v. Kerner, 404 U.S. 519 (1972), the District Court gave Scott every benefit of interpretation.

Petitioner intentionally omits from his Appendix the bodies of both the Third Amended Complaint and the Fifth Amended Complaint and now incants the general mantra of his EEOC charge - that he was "harassed, transferred and discharged because of my race . . . and as an act of retaliation [for filing a January, 1995, same-gender sexual harassment charge]." In relying upon that general allegation, Scott asks this Court to ignore the very detailed and specific allegations

in both the Third Amended Complaint and Fifth Amended Complaint.

For instance, granting Scott a liberal reading of the Third Amended Complaint, the race discrimination allegations are found in paragraphs 15, 16, 22, 24, 25, 27, 31, 34-37, 39-42 and 61-65. The dates involving those extensive and specific race discrimination allegations fall more than two years before March 11, 1996. Petitioner is hiding behind his pro se status and relying upon a general string of verbs in one sentence of his EEOC charge, compared to 118 factually detailed numbered paragraphs of allegations. The District Court's reliance upon both the body and exhibits of the Third Amended Complaint accords with Rule 10(c) and does not conflict with this Court's holdings construing pleadings of pro se litigants.

Likewise, while shorter, Scott's Fifth Amended Complaint is even more pointed and belies his pro se status. Count 1 of the Fifth Amended Complaint consists of two parts. The first part, entitled "Title VII - Racial Discrimination", includes specific factual allegations in paragraphs 8 through 32, all of which are related to racial harassment and racially motivated termination. In detailed contrast, the second part of Count 1, entitled "Title VII - Retaliation for Previous EEOC Charge", consisting of paragraphs 33 and 34, specifically refers to Scott's proposed transfer from Norfolk, Virginia to Decatur, Illinois, as retaliation for having filed a Title VII same-gender sexual harassment charge with the EEOC on January 27, 1995. While the March, 1996 EEOC charge containing the general mantra of "harassment, transfer, and termination based upon his race and in retaliation" is appended to the Fifth Amended Complaint, the "experienced pro se litigator" (Respondents' Appendix F) took great pains in the body of the Fifth Amended Complaint to differentiate between his Title VII race discrimination claim and his Title VII retaliation for same-gender sexual harassment claim. Having taken those

great and specific pains to differentiate between the two, petitioner may not now hide behind his pro se status.

II. The District Court's Dismissal of the §1981 Claim After the Third Amended Complaint as Not Erroneous.

Petitioner knowingly and glaringly omitted from his appendix the body of the Third Amended Complaint, which contained the factual allegations necessary to the resolution of the § 1981 claim. A reading of the body of the Third Amended Complaint discloses racial discrimination allegations in paragraphs 15, 16, 22, 24, 25, 27, 31, 34-37, 39-43, and 61-65, all of which cover dates prior to March 11, 1994, the cut-off date for the § 1981 statute of limitations. No other race discrimination allegations exist other than the general statement from his EEOC charge. In contrast, he also makes specific allegations of retaliation for having filed a same-gender sexual harassment claim in paragraphs 67-78, 81-84, 90, 91, 93, 106 and 111-116 (especially paragraph 116) of his Third Amended Complaint. Therefore, notwithstanding the general statement in his March 1996 EEOC charge and affidavit, the numerous detailed allegations of the Third Amended Complaint disclose no race discrimination that would fall within the § 1981 statute of limitations. See Williams v. Norfolk & W. Ry., 530 F.2d 539, 541 (4th Cir. 1975); Bradley v. Carydale Enterprises, 707 F. Supp. 217, 220 n.8 (E.D. Va. 1989). The District Court did not err in dismissing plaintiff's § 1981 claim.

Petitioner carefully points to paragraphs 66 and 68-70 (Petition, p. 6) of the Third Amended Complaint as supporting his § 1981 claim based on the EEOC charges verbal string. Yet, paragraph 66 contains only factual allegations concerning Scott's same-gender sexual harassment complaints to "white" supervisors; paragraph 68 contains no racial discrimination allegations. Stripped of

their invective, paragraphs 69 and 70 contain allegations against W. F. Henley of making (death) threats against Scott.

> in reaction to the plaintiff's complaints made for sexual harassment and the Federal EEOC Complaint and the civil action filed pursuant to the Federal EEOC Complaint by plaintiff.

(Respondents' Appendix B, ¶ 66, 68-70). His reliance on paragraphs 69-78, 90-93, and 103-106 is likewise misplaced. Again, stripped of admittedly racial invective, paragraphs 69-78 accuse various supervisors of taking allegedly adverse employment actions "in reaction to" Scott's same-gender sexual harassment EEOC charge and resulting lawsuit. Paragraphs 90-93 contain none of the racial invective chanted in paragraphs 69-78, and refer specifically to Scott's transfer from Norfolk to Decatur as being "retaliatory in reaction to" his same-gender sexual harassment EEOC charge and lawsuit. (Respondents' Appendix B, ¶ 90-93). Likewise, paragraphs 103-106, referring to surveillance and Scott's termination, contain no allegations of racial discrimination. (Respondents' Appendix B, ¶ 103-106). Petitioner can only speculate that the District Court violated the tenets of Rule 10(c) given the specific allegations in the body of the Third Amended Complaint.

III. Jury Verdicts on Racial Harassment and Racial Termination Preclude Relitigation of the § 1981 Claims.

Scott's Title VII racial discrimination claims based on allegations of racial harassment and racial termination were submitted to the jury and verdicts were returned in favor of NS. (Respondents' Appendix G). The elements of the required prima facie case under Title VII are the same as those under § 1981, and the Title VII and § 1981 proof schemes are identical. Patterson v. McClain Credit Union,

491 U.S. 164, 186 (1989); Gairola v. Comm'r. of Virginia Dept. of Gen. Serv., 753 F.2d 1281, 1285 (4th Cir. 1985). See also Durham v. Xerox Corp. 18 F.3d 836, 839 (10th Cir. 1994); Grano v. Dept. of Development, 637 F.2d 1073, 1082 (6th Cir. 1980). The jury verdicts on the Title VII racial harassment issues are dispositive of Scott's § 1981 racial discrimination claims, rendering any alleged error by the District Court harmless. "When a trial court's findings of fact [now a jury verdict] in a fully litigated Title VII claim are dispositive of the claimant's previously dismissed legal claims, any error in the dismissal of those claims has been rendered harmless." Spencer v. General Electric Company, 894 F.2d 651, 656 (4th Cir. 1990); see also Blyer v. Smith, 867 F.2d 184, 192-93 (4th Cir. 1989). Because the jury found no racially discriminatory actions or intent by NS under the Title VII claim, it likewise could find none under §1981. Grano, supra, 637 F.2d at 1082.

IV. The District Court Properly Limited Scott's Claim Regarding His Discharge to Race, Not Retaliation, and Properly Limited Scott's Claim Regarding His Transfer to Same-Gender Sexual Harassment Retaliation, Not Race.

Scott readily admits that the District Court permitted him to amend his Complaint three times; a fourth amendment was denied prior to the District Court's consideration and ruling on NS's Motion to Dismiss Scott's Third Amended Complaint. Scott was then admonished by the District Court at the August 5, 1996 hearing on the Motion to Dismiss (Respondents' Appendix H) and again in the Court's order of August 14, 1996, to be clear and specific when amending his Title VII allegations for the fifth time. Scott filed his Fifth Amended Complaint on August 16, 1996.

Count I of the Fifth Amended Complaint (Respondents' Appendix D), omitted from Petitioner's Appendix, contains Title VII allegations of racial discrimination and Title VII allegations of retaliation for a previous EEOC same-gender sexual harassment charge and related lawsuits. Paragraphs 8 through 32 contain extensive details about Scott's racial discrimination complaints, starting with his hiring in August 1985, continuing through time-barred promotion, pay, and racial harassment allegations, then through more recent racial harassment claims, and leading up to his alleged racially motivated termination on February 16, 1996. These paragraphs focus exclusively (and repetitively) on actions that NS took "because of his race." No allegations are made of the harassment or the termination being "retaliatory"; no mention is made of Scott's proposed February 1996 transfer from Norfolk, Virginia to Decatur, Illinois.

In stark contrast, paragraphs 33 and 34 contain the details of Scott's retaliation claim. In those two paragraphs, Scott complains that his proposed February 1996 transfer from Norfolk to Decatur was in retaliation for his earlier same-gender sexual harassment EEOC complaint. He made no allegation that the transfer was "racially motivated."

During the course of discovery, Scott began to claim that everything was both racial and retaliatory. These clams went beyond the allegations of the Fifth Amended Complaint, and NS therefore included the issue of the scope of the Fifth Amended Complaint for the District Court's consideration as part of NS's summary judgment motion. The District Court ruled that Scott was limited to the discharge and transfer allegations of his Fifth Amended Complaint: (1) a racial, not retaliatory, discharge, and (2) a retaliatory, not racial, transfer. (Respondents' Appendix I). While Scott did attach his EEOC charge (but not his EEOC affidavit) to his Fifth Amended Complaint, this attachment, with its own vague descriptions of his complaints made to the EEOC, did not satisfy the District Court's order that Scott

clearly specify his Title VII allegations in his Fifth Amended Complaint. Moreover, the general allegations in the EEOC charge - "harassed, transferred, and terminated because of my race . . . and in retaliation" - were factually fleshed out by the detailed allegations in paragraphs 8-32 and paragraphs 33-34 of the Fifth Amended Complaint.[7] The District Court had discretion and authority to control the pleadings, claims, and evidence before it, particularly in a circumstance where four amendments had been permitted and where plaintiff had been instructed to be clear and specific. The District Court did not err in limiting Scott's claims to a racially motivated discharge and retaliatory transfer

V. Scott's Petition Lacks Merit Under Supreme Court Rule 10.

Under this Court's rules, Scott's Petition for a Writ of Certiorari lacks merit. See Sup. Ct. R. 10. It addresses no conflict on an important matter between two or more circuits; no conflict between an important federal question and decision of a state court of last resort; nor exhibited a departure from the accepted and usual course of judicial proceedings. It speaks to no conflict on an important federal question between a state court of last resort and a decision of another state court of last resort or of a United States Court of Appeals. Nor does it bear on an important question of federal law that has not been, but should be, settled by this Court, or one which is in conflict with relevant decisions of this Court. Id. Petitioner apparently claims that the District Court's perceived failure to accord an "experienced pro se litigator" all of the pleading latitude called for in Haines v.

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[7]In any event, Petitioner has no claim based upon the transfer from Norfolk to Decatur because the transfer was cancelled; Scott suffered no "adverse employment action." Hale v. Marsh, 808 F.2d 616, 619 (7th Cir. 1986); Foster v. Township of Hillside, 780 F. Supp. 1026 (D.N.J. 1992); Hammil v. Banque Paribas, 780 F. Supp. 196 (S.D.N.Y. 1991).

Kerner, and the District Court's alleged failure to consider general EEOC charge allegations over the specific factual allegations of either the Third or Fifth Amended Complaints somehow creates a conflict with this Court's decisions. As discussed above, Petitioner's claims merely invite speculation by this Court. No compelling reason exists to burden this Court's docket with a matter wholly confined to a grievance which impacts only a single individual. This Court has stated:

> it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.

Layne & Bowler Corp. v. Western Wells Work, Inc., 261 U.S. 387, 393 (1923). As in Layne & Bowler Corp., "[t]he present case certainly comes under neither head." Id.

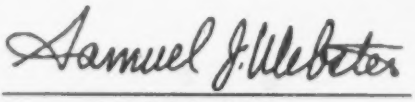
Petitioner pins his entire argument on the general allegations of his EEOC charge. Standing alone, they are insufficient as a matter of law to support any claim because they are totally devoid of any factual allegations. Therefore, consistent with Federal Civil Rule 10(c), these general allegations were read by the District Court in the context of Petitioner's specific factual allegations in both the Third and Fifth Amended Complaints.

CONCLUSION

For the foregoing reasons, Respondents, Norfolk Southern Corporation, et. al, respectfully request this Court to deny the Petition for Writ of Certiorari. The liberality accorded to pro se pleadings may not be used to compel a

District Court to ignore the voluminous, detailed, factual allegations in a complaint. Neither the District Court nor the Fourth Circuit Court of Appeals ignored this Court's holdings concerning pro se pleadings; rather, the District Court, affirmed by the Fourth Circuit, construed plaintiff's pleadings as a whole and particularly examined the very detailed pleadings contained in the body of the Third Amended Complaint and Fifth Amended Complaint. Therefore, respondents, respectfully request that Scott's Petition for Writ of Certiorari be denied.

NORFOLK SOUTHERN CORPORATION
DAVID R. GOODE, et al



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In The
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APPENDIX TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent's Appendix A
History Of Michael A. Scott Litigation

SCOTT LITIGATION HISTORY

Scott first filed Scott I in March, 1995, (E.D. Va. Civil Action No. 2:95cv377), alleging breach of contract (based on Title VII), assault and battery, and intentional infliction of emotional distress, based on allegations of same-gender sexual harassment. (The case was filed in state court, but was removed to federal court). Scott then attempted to file a pro se Title VII action based on his complaints of same-gender sexual harassment. That Complaint was voluntarily dismissed and Scott II (E.D. Va. Civil Action No. 2:95cv815) was subsequently filed by Scott's counsel. Scott II alleged a Title VII claim, based on the Scott's allegations of same-gender sexual harassment. Scott I and Scott II were consolidated, Scott's Title VII claim was dismissed, certain other claims were also dismissed, and the remaining claims were tried in December 1995. Scott ultimately recovered a $50,000.00 judgment against a former NS employee and NS on a claim of common law battery. That judgment was satisfied. Scott was represented by counsel in Scott I and Scott II.

In Scott III (E.D. Va. Civil Action No. 2:95cv1163), Scott made a claim against NS and four supervisors under the Federal Employers' Liability Act, based upon the same facts alleged in ScottI/II. Summary Judgment was granted for NS based upon res judicata.

In Scott IV (Norfolk Circuit Court, At Law No. L96-392), Scott sued both NS and its ScottI/II trial counsel, as well as the firm and counsel representing a former NS employee in ScottI/II, alleging that the defense in that case was racially discriminatory and malicious. The defendants' demurrers were sustained and Scott noted an appeal to the Virginia Supreme Court.

In Scott V (E.D. Va. Civil Action No 2:96cv257), the instant appeal, Scott brought a variety of claims based upon his February 16, 1996, termination by NS, complaining about, inter alia, racial harassment and discrimination, wrongful discharge, retaliation, a personal injury, an assault and battery, and emotional distress. After numerous amendments and a variety of dismissal and summary judgment orders, Scott V was tried to a jury verdict in April 1997, before the Honorable Henry Coke Morgan, Jr. All discrimination, harassment, and retaliation claims were either dismissed by the District court or submitted to the jury, which returned a defense verdict on those claims. Scott recovered $4,998.00 on a Federal Employers' Liability Act slip and fall personal injury claim; this judgment was satisfied. Scott appealed ScottV. The Fourth Circuit affirmed the judgment in part and vacated in part. (See Record No. 97-1490, the appeal of Scott V). Scott seeks a Writ of Certeriori; Case No. 98-1138, from portions of the Fourth Circuit affirmance.

In Scott VI (E.D. Va. Civil Action No. 2:96cv610), Scott sought to raise allegations he had allegedly omitted from the Scott V Third Amended Complaint. Scott VI was stayed.

In Scott VII (E.D. Va. Civil Action No. 2:96cv699), Scott again sued NS, its counsel, and counsel for the former NS employee involved in Scott I/II, based on his complaints regarding the dismissal of the Scott IV state court case. The District Court granted all defendants' motions to dismiss Scott VII and imposed $2000.00 sanctions on Scott. In consideration for the sanctions award not being pursued in Scott VII, Scott dismissed with prejudice Scott III, IV and VI, and did not appeal Scott VII.

In Scott VIII (E.D. Va. Civil Action No. 2:97cv522), Scott again sued NS and numerous NS employees complaining about personal classified advertisements which had appeared in the Virginian-Pilot newspaper in May 1997. Scott's claims against NS, thirteen individual NS employees,

and co-defendant Landmark Communications were all dismissed. Scott was sanctioned $9143.13 for filing a frivolous action against NS and the thirteen individual NS employees. Some against the fourteenth individual NS employee, Jerry W. Clemmer, were dismissed prior to trial. Scott was later sanctioned $930.50 for filing a frivolous motion to reconsider claims against Clemmer. Scott was also sanctioned for filing frivolous claims against Landmark Communications. A pre-filing injunction was also imposed on Scott. The case proceeded to trial against Clemmer, where additional claims were dismissed by the District Court, and the jury returned a defense verdict on the remaining claims. Scott appealed the District Court's rulings with respect to NS and the thirteen individual NS employees; over Clemmer's objections, Scott was granted leave to file a late appeal against Clemmer. The Scott VIII appeal is presently pending before the Fourth Circuit. (See Record Nos. 98-1098 and 98-2303).

In Scott IX (E.D. Va. Civil Action No. 2:97cv1134), Scott sued two NS employees, Catron and Hedgepath, who conducted surveillance at the direction of NS on Scott in February 1996 after Scott allegedly fell and was injured at an NS facility. The Scott IX Complaint, filed December 5, 1997, focused on that surveillance, the alleged reasons for the surveillance, and an alleged confrontation between Catron and Scott. By motion of January 10, 1998, Scott attempted to amend the Scott IX Complaint to add twenty-one additional defendants (including NS) and a variety of additional legal theories. The District Court denied the amendment by Opinion and Order of March 5, 1998. The District Court granted Defendants' motion to dismiss and for summary judgment and a judgment order was entered on June 30, 1998. Rule 11 sanctions were awarded, the amount of $5,000.00, set by judgment order of September 2, 1998. Scott is appealing Scott IX, to the Fourth Circuit having been granted leave to file a late notice of appeal, over the objections of the defendants. (See Record No. 98-2664).

In Scott X (E.D. Va. Civil Action No. 2:98cv180), Scott sued NS , fourteen NS supervisory employees and NS's counsel, complaining about the attempts to collect on the sanction judgments awarded in Scott VIII. The District Court granted all the defendant's motions to dismiss by Opinion and Order entered July 8, 1998. Scott has appealed this case to the Fourth Circuit (Record N. 98-2664).

Respondent's Appendix B
Third Amended Complaint With Attachments

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

MICHAEL A. SCOTT
on behalf of himself
4753 Longmont Road
Virginia Beach, Virginia
23456-5017

and

ALL OTHER BLACK PERSONS SIMILARLY SITUATED

Plaintiffs,

vs. Civil Action No. 2:96cv257

NORFOLK SOUTHERN CORPORATION
c/o John Shannon
Three Commercial Place
Norfolk, Virginia 23514

and

D. R. GOODE
Three Commercial Place
Norfolk, Virginia 23514

and

S. C. TOBIAS
Three Commercial Place

Norfolk, Virginia 23514

and

J.L. MANETA
110 Franklin Road
Roanoke, Virginia 24042

and

D.W. MAYBERRY
110 Franklin Road
Roanoke, Virginia 24042

and

W.E. HONEYCUTT
110 Franklin Road
Roanoke, Virginia 24042

and

L.D. HALE
110 Franklin Road
Roanoke, Virginia 24042

and

T.A. HEILIG
110 Franklin Road
Roanoke, Virginia 24042

and

C.D. VITTUR
110 Franklin Road
Roanoke, Virginia 24042

and

D.D. GRAAB
110 Franklin Road
Roanoke, Virginia 24042

and

A.L. LUTTRELL
110 Franklin Road
Roanoke, Virginia 24042

and

J.R. GRAY
2200 Redgate Avenue
Norfolk, Virginia 23507

and

W.F. HENLEY
2200 Redgate Avenue
Norfolk, Virginia 23507

and

J.E. PAIR
2200 Redgate Avenue
Norfolk, Virginia 23507

and

J.W. CLEMMER
2200 Redgate Avenue
Norfolk, Virginia 23507

AMENDED MOTION FOR JUDGMENT

The Plaintiff hereby moves this Court for judgment against the said Defendants in the amounts hereinafter set forth, with interest, together with his costs in this action, all of which he is due from the Defendants upon the grounds hereinafter set forth:

1. That Plaintiff is a citizen and resident of the Commonwealth of Virginia, residing in Virginia Beach, Virginia.

2. That Defendant Norfolk Southern Corporation is a corporation chartered under the laws of the Commonwealth of Virginia and was an employer of the Plaintiff from August 16, 1985 to February 16, 1995 within the meaning of the Federal Employers' Liability Act (FELA), 45 U.S.C.A. sec 51 *et seq.*, and the Federal Railroad Safety Act (FRSA), 45 U.S.C.A. sec 421 *et seq.* and does business in Norfolk, Virginia. Norfolk Southern Corporation has protected classes of minority employees, including blacks and females, within the corporation.

3. That Defendants D. R. Goode, S. C. Tobias, D. W. Mayberry, J. L. Manetta, W. E. Honeycutt, C. D. Vittur, D. D. Graab, A. L. Luttrell, T. A. Heilig, L. D. Hale, J. R. Gray, W. F. Henley, J. E. Pair and J. W. Clemmer are white males and are residents of the Commonwealth of Virginia.

4. That Plaintiff is a black male, of a protected class, and was a minority employee, of a protected class, of Norfolk Southern Corporation from August 16, 1985 to February 16, 1996.

5. That Plaintiff and Defendants are subject to the jurisdiction of Constitutional Laws and Federal Statutes of the United States of America.

6. That Plaintiff attended Tuskegee Institute (now Tuskegee University) in Tuskegee Institute, Alabama in 1985. Norfolk Southern Corporation interviewed the Plaintiff for possible employment while at Tuskegee Institute

interviewing prospective minority applicants in early Spring, 1985.

7. That Norfolk Southern Corporation told the Plaintiff during the said interview at Tuskegee Institute that Norfolk Southern Corporation was seeking Minority Engineers for future Management Positions in the corporation.

8. That Norfolk Southern Corporation invited the Plaintiff, and the Plaintiff accepted, to a regional interview in Montgomery, Alabama where Norfolk Southern Corporation administered written psychological examinations and other written tests to the Plaintiff and other prospective applicants.

9. That Norfolk Southern Corporation interviewed the Plaintiff during the said regional interview process and again told the Plaintiff that Norfolk Southern Corporation was seeking Minority Engineers for future Management Positions in the corporation.

10. That Norfolk Southern Corporation invited the Plaintiff, and the Plaintiff accepted, to a third interview at it's Atlanta, Georgia Personnel Office in early Summer, 1985 and again told the Plaintiff that Norfolk Southern Corporation was seeking Minority Engineers for future Management Positions in the corporation.

11. That Norfolk Southern Corporation offered the Plaintiff an oral contract of employment during the said third interview and the Plaintiff accepted the oral contract of employment offer at the time of the third interview.

12. That Norfolk Southern Corporation told the Plaintiff during the said third interview that the Plaintiff's first employment position would be a Management Trainee to attend several months of training in preparation for a future management position.

13. That Plaintiff began employment with Norfolk Southern Corporation on August 16, 1985 as a Management Trainee at it McDonough, Georgia Training Center.

14. That Norfolk Southern Corporation hired five other white Engineers as Management Trainees who began work at or within two weeks of the Plaintiff. The Plaintiff joined the five white Engineers, and all completed the management training program together.

15. That Plaintiff's starting salary with Norfolk Southern Corporation was approximately $27,600.00 beginning on August 16, 1985, significantly lower than the said five white Engineers hired as Management Trainees by Norfolk Southern Corporation in 1985.

16. That Norfolk Southern Corporation intentionally and subliminally discriminated against the Plaintiff by providing the said five white Engineers and other white Engineers a higher starting salary than the Plaintiff for the same work.

17. That Norfolk Southern Corporation provided the Plaintiff with extensive training at the said training center and some travel to many of it's larger mechanical department shop facilities during the period beginning August 16, 1985 through July 1986.

18. That Plaintiff completed Norfolk Southern Corporation's management training program in July 1986.

19. That in July, 1986 Norfolk Southern Corporation sent the Plaintiff, temporarily, to work at it's Inman Yard facility in Atlanta, Georgia under the direction of Master Mechanic J. R. Corea.

20. That on the Plaintiff's first day of work at the said Inman Yard facility, Mr. Corea met privately, one on one, with the Plaintiff and questioned the Plaintiff about Plaintiff's career goals and expectations with Norfolk Southern Corporation.

21. That Plaintiff told Mr. Corea during the private meeting, in response about the Plaintiff's career goals and expectations, that the Plaintiff hoped to advance into management, master mechanic level or above, in the future with the corporation.

22. That Mr. Corea told the Plaintiff that Blacks are not and have never been promoted to the master mechanic level or above with Norfolk Southern Corporation and probably never will be, especially the Plaintiff.

23. That Plaintiff was promoted to Foreman Gang CD, a first line supervisory position, in Bluefield, West Virginia on or about August 16, 1986. Plaintiff reported to Master Mechanic E. F. Campbell in Bluefield, West Virginia.

24. That Norfolk Southern Corporation promoted the said five white Management Trainees and other white Engineers hired as Management Trainees in 1985 to higher rated and higher paying positions than the Plaintiff thereby intentionally discriminating against the Plaintiff without just cause or motivation.

25. That Norfolk Southern Corporation continued to promote the said five white Management Trainees and other white Management Trainees hired in 1985, over the years 1985 to 1996, to higher rated and higher paying position while leaving the Plaintiff at the low level of pay first line supervisory position, Foreman Gang CD.

26. That Mr. Campbell assigned the Plaintiff to work at Norfolk Southern Corporation's Bluefield Car Department under the supervision of Senior General Foreman H. A. Haldren, a white male.

27. That Plaintiff was the first black or minority non-agreement salaried officer for the Norfolk Southern Corporation that had ever work in the Bluefield Car Department. *Norfolk Southern Corporation's hiring and promotion practices for agreement contract employees, and non-agreement salaried employees and college educated black professionals, especially black females are racially and disproportionately biased across-the-board to the detriment of blacks and other minorities.*

28. That Mr. Campbell created locally, before the Plaintiff transferred there, at Bluefield Car Department, the position of "Acting Car Foreman" with unofficial Car

Forman duties, but not Car Foreman's pay. Prior to the Plaintiff's transfer to Bluefield, West Virginia, Mr. Campbell assigned Forman Gang CD M. S. Winfrey, a white male, to the Acting Car Forman's Position. The said position also included the duties of assistant to Senior General Foreman H. A. Ha ldren, and in Mr. Haldren's absence, charged with the responsibility of the Bluefield Car Department.

29. That in November, 1986, Mr. Winfrey was promoted to Senior General Foreman at Andover, Virginia.

30. That in November, 1986 Mr. Campbell assigned the Plaintiff to the Acting Car Forman's position at Bluefield Car Department. Mr. Campbell charged Mr. Haldren with the responsibility of notifying the Plaintiff that the Plaintiff would assume the said Acting Car Forman's position and duties.

31. That in November, 1986, Mr. Haldren notified the Plaintiff that the Plaintiff would be his new assistant, but stated that it was not his choice because he (Mr. Haldren) had never had a black assistant. Mr. Haldren further stated that he didn't really want a black assistant because he didn't think a black person, especially the Plaintiff being new to the job, could handle the responsibilities and that his choice for his new assistant was Foreman Gang CD S. E. Six, a white male.

32. That in 1987 and 1988 Mr. Campbell told the Plaintiff on several occasions that he (Mr. Campbell) was in the process of obtaining Norfolk Southern Corporation's management approval for making the Acting Car Foreman's position an official position and would promote the Plaintiff to the new Car Foreman's position upon management approval of the new position. The Plaintiff told Mr. Campbell that Plaintiff had an express interest in the new position and looked forward to becoming an official Car Foreman. Thereafter Plaintiff made repeated inquiries and requests to Mr. Campbell and Mr. Haldren for a promotion

and or a position with increased responsibility over the period of 1987 to 1989.

33. That Plaintiff worked the Acting Car Foreman's position as a Foreman Gang CD from November 1986 to October, 1989.

34. That in Summer, 1988 the Plaintiff was racially attacked, assaulted and battered while at work at Norfolk Southern Corporation's Bluefield Car Shop facility by Norfolk Southern Corporation's servant Car Repairer E. W. Yopp, a white male.

35. That Plaintiff reported the said racial attack by Mr. Yopp of the Plaintiff immediately after it's occurrence to Mr. Haldren.

36. That Norfolk Southern Corporation authorized and ratified the said racial attack by it's failure to formally investigate the racial attack and by it's failure to punish Mr. Yopp. Instead, Norfolk Southern Corporation authorized sick benefit pay for Mr. Yopp and eventually began paying Mr. Yopp retirement benefits.

37. That Norfolk Southern Corporation retaliated against the Plaintiff for the Plaintiff being outspoken against and Plaintiff's refusal to participate with other white male supervisors, including Mr. Haldren, in their campaign of racial harassment of black car repairers, especially W. J. Jefferies, III, in Bluefield Car Department. The said retaliation including temporarily removing the Plaintiff from the Acting Car Foreman's position and eventual transfer of the Plaintiff to Norfolk, Virginia while the Plaintiff was fully engaged in building a new home (75% complete) in Bluefield, West Virginia at the time of the transfer. Norfolk Southern Corporation, Mr. Campbell and Mr. Haldren were fully cognizant of the Plaintiff's efforts in building the new home.

38. That Norfolk Southern Corporation's management approved the said Acting Car Foreman's position at Bluefield Car Department, effective on or about November 1, 1989. The said official position had a higher

grade level and pay than the Plaintiff's Foreman Gang CD position.

39. That Norfolk Southern Corporation *laterally transferred* the Plaintiff, effective on or about November 1, 1989, without promotion or pay increase to it's Norfolk, Virginia 38th Street Car Shop facility to work as a Foreman Gang CD in place of Foreman Gang CD Russ Parks, a white male of equal rank and position to the Plaintiff, who was promoted to the new official Car Foreman's position in the said Bluefield Car Department.

40. That Norfolk Southern Corporation's lateral transfer of the Plaintiff combined with it's promotion of a white male of equal rank and position to the Plaintiff, Russ Parks, to the said new official Car Foreman's position in Bluefield Car Department represents blatant, intentional, disparate impact and disparate treatment discrimination against the Plaintiff. This representative type of intentional and systematic disparate impact and disparate treatment discrimination is typical and a common occurrence across-the-board in the corporation and perpetuated by the Defendants and other white male lower, middle, upper and executive managers within the corporation.

41. That Norfolk Southern Corporation did not notify the Plaintiff in any manner whatever of the Acting Car Foreman's position in Bluefield Car Department becoming an official Car Foreman's position, effective simultaneously with the Plaintiff's lateral transfer to Norfolk, Virginia, 38th Street Car Shop facility. Further, Norfolk Southern Corporation had no established system available (anywhere in the corporation) for the Plaintiff to apply for the official Car Foreman position or any other non-agreement salaried position vacant and available in the corporation.

42. That Norfolk Southern Corporation did not offer the Plaintiff an opportunity to apply for nor to be promoted to the said new Car Foreman's position, especially since the Plaintiff had been assigned the unofficial Acting Car Foreman's position for the three previous years, 1986 to

1989, and after being told previously by Mr. Campbell that the Plaintiff would be promoted to the position when it was officially approved, and while the Plaintiff was in the process of building a new home.

43. That Plaintiff and Russ Parks were of equal rank and position as Foreman Gang CD with Norfolk Southern Corporation prior to November 1, 1989. Plaintiff was fully qualified and more qualified than Russ Parks for the said official Car Foreman's position, especially since the Plaintiff was already working the said position in an unofficial capacity for the three previous years, November 1986, to October, 1989.

44. That Norfolk Southern Corporation has never had an established system for advertising and or publicizing non-agreement salaried positions available to employees within the corporation to apply for based on qualifications. The said lack of system contributed to the disparate impact and disparate treatment racial discrimination against the Plaintiff and other minority employees across-the-board in the corporation and perpetuated by the Defendants and the corporation's other white male lower, middle, upper or executive managers.

45. That Norfolk Southern Corporation has never had an established system for it's non-agreement salaried and management employees to apply for internal job positions or promotions, based on qualifications, within the corporation. The said lack of system contributes, across-the-board, to racial bias against the Plaintiff and other black and minority employees and to the disparate impact and disparate treatment racial discrimination against the Plaintiff and other minority employees of the corporation and perpetuated by the Defendants and the corporation's other white male lower, middle, upper or executive managers.

46. That all of Norfolk Southern Corporation employee promotions, job changes and job transfer decisions are made subjectively across-the-board by the Defendant s and the corporation's other white lower, middle, upper or

executive male management employees. This process for promotion decisions is racially biased against the Plaintiff and other black and minority employees and perpetuates the intentional racial discrimination of all black and other minority employees, including the Plaintiff, throughout the corporation.

47. That Norfolk Southern Corporation has never had a black or other minority employee in a lower, middle, upper or executive management position in the corporation and has discriminatory practices which have and continue to foster racially stratified job environments to the disadvantage of the Plaintiff and other black and minority employees across-the-board in the corporation. The Plaintiff and other minority employees have no means whatever in obtaining knowledge regarding management or other non-agreement salaried positions vacant and available within the corporation. This lack of knowledge disadvantages the Plaintiff and other minorities in their promotional prospects. Norfolk Southern Corporation provides no system for advertising management and other non-agreement salaried positions vacant and available to the Plaintiff and other minority employees in the corporation. The lack of means for advertising vacant and available positions in the corporation is used by the white male lower, middle, upper and executive managers to intentionally disadvantage the Plaintiff and other minority employees working for the corporation and represents *obvious across-the-board class discrimination.*

48. That Norfolk Southern Corporation has never had a black or other minority employee at the Master Mechanic level or above in it's mechanical department due to the said racially stratified job environment and the subjective manner in which decisions are made for job promotions and transfers by the white male lower, middle, upper and executive managers in the mechanical department.

49. That Norfolk Southern Corporation has never had a black or other minority employee at the Assistant

Division Engineer level or above in it's engineering department due to the said racially stratified job environment and the subjective manner in which decision are made for job promotions and transfers by the white male lower, middle, upper and executive managers in the engineering department.

50. That Norfolk Southern Corporation has never had a black or other minority employee, excluding one recent exception, at the Superintendent level or above in it's transportation department due to the said racially stratified job environment and the subjective manner in which decisions are made for job promotions and transfers by the white male lower, middle, upper and executive managers in the transportation department.

51. That Norfolk Southern Corporation has never had a black or other minority employee at the General Supervisors level or above in it's communications and signals department due to the said racially stratified job environment and the subjective manner in which decisions are made for job promotions and transfers by the white male lower, middle, upper and executive managers in the communications department.

52. That the mechanical department, engineering department, transportation department and the signals and communications department are operations departments and represent a great majority of Norfolk Southern Corporation's jobs and employees. *The lower, middle, upper or executive management positions for the said departments are currently and have always been filled by white males.*

53. That Norfolk Southern Corporation, by it's white lower, middle, upper or executive male managers, maintains a so-called glass ceiling for it's black and other minority employees thereby confining promotions of minority employees to low level non-agreement salaried supervisory or other low level positions throughout the corporation. The said glass ceiling effect on the corporation's minority employees is perpetuated by the

Defendants and the corporation's other white male landscape of lower, middle, upper or executive managers and represents intentional and systematic disparate impact and disparate treatment racial discrimination against the Plaintiff and other minority employees across-the-board in the corporation. The glass ceiling has the express intent of fomenting intracorporate racial segregation and racially stratified job environments among the corporation's management and in their public management office spaces to the detriment of the Plaintiff, blacks and other minorities resulting in across-the-board class discrimination in the management and supervisory levels of Norfolk Southern Corporation. The said glass ceiling effect, as referred to herein, refers to blacks and other minorities being able to see the lower, middle, upper or executive management positions and know of their existence, but cannot overcome the corporation's invisible barriers to obtain the positions based on qualifications.

54. That Norfolk Southern Corporation has black and other minority employees who are fully qualified to hold lower, middle, upper or executive management positions, but refuses to promote minority employees above the said lower non-agreement salaried supervisory positions thereby deliberately maintaining the corporation's white male landscape of lower, middle, upper or executive managers to perpetuate the said across-the-board racial discrimination and glass ceiling effect against the Plaintiff and other minority employees.

55. That Norfolk Southern Corporation's attempt at promoting blacks and other minority employees into low level non-agreement salaried supervisory positions is merely a pretext to the corporation's actual racially discriminatory practices and represents a superficial attempt at equal employment, but grossly misrepresents equal employment for the corporation's minority employees at all levels in the corporation. Norfolk Southern Corporation intentionally prevents, across-the-board, it's classes or minority

employees from being promoted to other than low level non-agreement salaried supervisory positions thereby engaging in across-the-board class discrimination. There is a disparity level between the number of black and other minority non-agreement salaried employees and the number of white non-agreement salaried employees at the low level supervisory positions across-the-board caused by the said intentional and systematic disparate impact and disparate treatment discriminating practices perpetuated by the Defendants and the corporation's other white male lower, middle, upper or executive managers.

56. That Norfolk Southern Corporation systematically discriminated against the Plaintiff and other black and minority employees in pay as compared with the white male employees of equal rank and position across-the-board in the corporation. The Plaintiff, blacks, and other minorities in non-agreement salaried positions tend to receive lower wages and pay increases than that of their white male counterparts across-the-board in the corporation.

57. That on January 3, 1992, while working at the said 38th Street Car Shop facility Plaintiff sustained an on-duty injury to the Plaintiff's right eye resulting in a disabling loss of sight in the right eye that affected the Plaintiff's peripheral and depth perception vision.

58. That in February, 1993, L. C. Smith, then a Master Mechanic in Norfolk, Virginia and now director-Mechanical Support for Norfolk Southern Corporation, asked the Plaintiff if the Plaintiff would be interested in taking an engineering staff position at the corporation's coal pier facility in Norfolk, Virginia.

59. That Mr. Smith told the Plaintiff that the Plaintiff would be promoted to one of the General Foreman's (engineering staff positions) being created at the said coal pier facility. The Plaintiff told Mr. Smith that the Plaintiff was interested in the said General Foreman's position and looked forward to being promoted to the position. Plaintiff made repeated inquiries and requests to Mr. R. G. Cundiff,

then a General Foreman and now a Senior General Foreman for Norfolk Southern Corporation, and Mr. Smith for a promotion and or position with more increased responsibility. The Plaintiff also submitted the said requests in written form on the Plaintiff's performance evaluations.

60. That on April 1, 1993 Norfolk Southern Corporation created and established four new engineering staff positions at the said coal pier facility, namely a General Foreman - Electrical, Electrical Foreman, General Foreman - Mechanical, and Mechanical Foreman.

61. That on April 1, 1993 Norfolk Southern Corporation promoted Defendant J. W. Clemmer, a white male, to the General Foreman - Mechanical position instead of the Plaintiff as the Plaintiff had been previously told by Mr. Smith.

62. That prior to April 1, 1993 Mr. Clemmer was an Assistant Foreman Gang - Piers and the Plaintiff was a Foreman Gang CD. The said Assistant Foreman Gang's position was a lower ranking one than Foreman Gang CD.

63. That Norfolk Southern Corporation's promotion of Mr. Clemmer to the General Foreman - Mechanical position from a lower ranking position than that of the Plaintiff's position, instead of the Plaintiff as the Plaintiff was told previously by Mr. Smith represents blatant, intentional and systematic disparate impact and disparate treatment racial discrimination against the Plaintiff. This representative type of blatant, intentional and systematic disparate impact and disparate treatment discrimination against the Plaintiff and other minority employees is typical and a common occurrence across-the-board in the corporation and perpetuated by the Defendants and other white male lower, middle, upper or executive managers within the corporation.

64. That Norfolk Southern Corporation did not offer the Plaintiff an opportunity to apply or have an established system (anywhere in the corporation) for the Plaintiff to apply for the said new General Foreman -

Mechanical position [or any other non-agreement salaried position vacant and available in the corporation], especially after Mr. Smith previously told the Plaintiff that the Plaintiff would be promoted to the said new position.

65. That instead the Plaintiff was promoted to Mechanical Foreman - Piers under the supervision of Mr. Clemmer on April 1, 1993.

66. That Plaintiff made formal complaints of sexual harassment and sexually hostile environment of the Plaintiff by white male supervisors at the said coal pier facility to Defendants Mr. Clemmer (twice verbally in April, 1993 and April, 1994), Mr. Gray (once verbally in April 1994), and D. D. Graab (once by written communication dated May 7, 1994), a Master Mechanic for Norfolk Southern Corporation, in 1993 and 1994. Norfolk Southern Corporation conducted an investigation of the Plaintiff's said written complaint to Mr. Graab in May 1994 that resulted in the termination of employment for one of the corporation's white male supervisory employees complained of by the Plaintiff.

67. That the said sexual harassment and sexually hostile environment complained of by the Plaintiff included all white male supervisors working at the coal pier facility and was perpetuated by all white male supervisors working at the coal pier facility.

68. That Plaintiff filed a complaint with the Federal equal Employment Commission (EEOC) in January, 1995 against Norfolk Southern Corporation for the said sexual harassment and sexually hostile environment.

69. That Defendant W. F. Henley, a General Foreman for Norfolk Southern Corporation, while acting out of racial hatred and personal vengeance towards the Plaintiff, made threats of violence and bodily harm against the Plaintiff after the Plaintiff made the said complaints of sexual harassment to the corporation and the Federal EEOC, and for the civil action filed pursuant to the Federal EEOC Complaint. The said threats were made by Mr. Henley,

while at work during Summer, 1995, in reaction to the Plaintiff's complaints made for sexual harassment and the Federal EEOC Complaint and the civil action, pursuant to the Federal EEOC Complaint, filed by the Plaintiff. The said threats of violence made by Mr. Henley against the Plaintiff were without just cause or justification.

70. That Mr. Henley, while acting out of racial hatred and personal vengeance toward the Plaintiff, made death threats towards the Plaintiff after the Plaintiff made the said complaints of sexual harassment to the corporation and the Federal EEOC, and for the civil action filed pursuant to the Federal EEOC Complaint. The said death threats were made by Mr. Henley, while at work during Summer, 1995, in reaction to the Plaintiff's complaints made for sexual harassment and the Federal EEOC Complaint and the civil action filed pursuant to the Federal EEOC Complaint by the Plaintiff. The said death threats made by Mr. Henley against the Plaintiff were without just cause or motivation.

71. That Defendant J. R. Gray, then a Senior General Foreman - Piers and now an Assistant Master Mechanic for Norfolk Southern Corporation, while acting out of racial hatred and personal vengeance towards the Plaintiff and in concert with D. D. Graab, then a Master Mechanic and now an assistant director-Locomotive Maintenance for Norfolk Southern Corporation, C. D. Vittur, then a manager-Eastern Region and now a manager-Roanoke Car Shop, D. W. Mayberry, then a vice president-Mechanical and now a vice president-Research and Tests for Norfolk Southern Corporation, and W. E. Honeycutt, then an vice president-Mechanical Car and now a vice president-Operating Rules for Norfolk Southern Corporation, began harassing and close scrutiny of the Plaintiff accusing the Plaintiff of not participating, with other white male supervisors, in the morning shift turnover, after the Plaintiff made the said complaints of sexual harassment to the corporation and the Federal EEOC and filed the civil action pursuant to the Federal EEOC Complaint, when in fact, the

Plaintiff usually had already participated in the shift turnover prior to Mr. Gray coming to work in the mornings. The said accusations made against the Plaintiff were made by Mr. Gray in reaction to the Plaintiff's complaints made for sexual harassment and the Federal EEOC Complaint and the civil action, pursuant to the Federal EEOC Complaint, filed by the Plaintiff. The said harassing and close scrutiny of the Plaintiff by Mr. Gray was without just cause or motivation.

72. That Defendant J. W. Clemmer, while acting out of racial hatred and personal vengeance towards the Plaintiff, began harassing and close scrutiny of the Plaintiff, in concert Mr. Gray and Mr. Graab, accusing the Plaintiff of not participating, with other white male supervisors, in the morning shift turnover, after the Plaintiff made the said complaints of sexual harassment to the corporation and Federal EEOC and filed civil action, pursuant to the Federal EEOC Complaint. The said accusations made against the Plaintiff were made by Mr. Clemmer in reaction to the Plaintiff's complaints made for sexual harassment and the Federal EEOC Complaint and civil action, pursuant to the Federal EEOC Complaint, filed by the Plaintiff. The said harassing and close scrutiny of the Plaintiff by Mr. Clemmer was without just cause or motivation.

73. That defendant J. E. Pair, an Engineer Pier Facilities for Norfolk Southern Corporation and the Plaintiff's last supervisor, while acting out of racial hatred and personal vengeance towards the Plaintiff, began harassing and close scrutiny of the Plaintiff, in concert with Mr. Gray and Mr. Graab, accusing the Plaintiff of not participating, with other white male supervisors, in the morning shift turnover, after the Plaintiff made the said complaints of sexual harassment to the corporation and Federal EEOC and filed civil action, pursuant to the Federal EEOC Complaint. The said accusations made against the Plaintiff were made by Mr. Pair in reaction to the Plaintiff's complaints made for sexual harassment and the Federal

EEOC Complaint and civil action, pursuant to the Federal EEOC Complaint, filed by the Plaintiff. The said harassing and close scrutiny of the Plaintiff by Mr. Pair was without just cause or motivation.

74. That Mr. Pair began harassing and close scrutiny of the Plaintiff, in concert with Mr. Gray and Mr. Graab, accusing the Plaintiff of not being a team player with any of the other white male supervisors working at the coal pier facility, after the Plaintiff made the said complaints of sexual harassment to the corporation and Federal EEOC and filed civil actions pursuant to the Federal EEOC Complaint, when in fact, the Plaintiff told Mr. Pair that the said white male supervisors singled out and cast out the Plaintiff with the intent of perpetrating a unified disassociation with the Plaintiff and refused to work with and communicate with the Plaintiff because of the "whistleblowing" complaints made by the Plaintiff so as to cast the Plaintiff in the most negatively infamous or odious light possible. The said accusations made against the Plaintiff were made by Mr. Pair in reaction to the Plaintiff's complaints made for sexual harassment and the Federal EEOC Complaint and civil action, pursuant to the Federal EEOC Complaint, filed by the Plaintiff.

75. That Mr. Pair began harassing and close scrutiny of the Plaintiff, in concert with Mr. Gray and Mr. Graab, accusing the Plaintiff of not regularly attending the morning first shirt safety meetings at the coal pier facility, when in fact, Mr. Pair usually did not attend the safety meetings and Mr. Gray and Mr. Graab almost never attended the safety meetings. The said accusations made against the Plaintiff were made by Mr. Pair in reaction to the Plaintiff's complaints made for sexual harassment and the Federal EEOC Complaint and the civil action, pursuant to the Federal EEOC Complaint filed by the Plaintiff.

76. That Mr. Clemmer, while acting out of racial hatred and personal vengeance towards the Plaintiff and in concert with other Defendants, made repeated references to

the Plaintiff as an *incompetent black engineer directly* to the Plaintiff and often stated to the Plaintiff that he (Mr. Clemmer) preferred working with the white male co-op students because he (Mr. Clemmer) thought the Plaintiff was incompetent and could not understand his (Mr. Clemmer) instructions. Mr. Clemmer further stated that the white male co-op students had no problem understanding his (Mr. Clemmer) instructions. The said references to *incompetent black engineer* made against the Plaintiff were made by Mr. Clemmer in reaction to the Plaintiff's complaints made for sexual harassment and the Federal EEOC Complaint and civil action, pursuant to the Federal EEOC Complaint, filed by the Plaintiff. Mr. Clemmer's repeated references to the Plaintiff as an *incompetent black engineer* were without just cause or motivation.

77. That Norfolk Southern Corporation, while in concert with the other Defendants, intentionally retaliated against the Plaintiff by completing poor job performance evaluations on the Plaintiff. The said poor job performance evaluations made against the Plaintiff were made by the corporation in reaction to the Plaintiff's complaints made for sexual harassment, the Federal EEOC Complaint and subsequent civil actions, pursuant to the Federal EEOC Complaint, filed by the Plaintiff. The said poor job performance rating was aimed at intimidating the Plaintiff to dismiss civil actions pending against the corporation. The poor job performance evaluations of the Plaintiff were unjustified and made without just cause or motivation.

78. That Norfolk Southern Corporation and the other confederates in this actions, while acting out of unauthorized vengeance, intentionally retaliated against the Plaintiff by substantially increasing the Plaintiff's work load through increased number of project assignments and larger project assignments than the other staff engineers working at the coal pier facility and negligently failing to provide assistance and supervisory guidance for the increased work load. The said increased work load for and negligent

supervision of the Plaintiff were made by the Defendants in reaction to the Plaintiff's complaints made for sexual harassment and the Federal EEOC Complaint and civil action, pursuant to the Federal EEOC Complaint, filed by the Plaintiff. The said increased work load for and negligent supervision of the Plaintiff were aimed at intimidating the Plaintiff to dismiss civil actions pending against the corporation and or resign from the corporation. The increased work load perpetrated on the Plaintiff by the Defendants was without just cause or motivation.

79. That Plaintiff filed civil actions, adjudicated this Court at 2:95cv377 and 2:95cv815, against Norfolk Southern Corporation and three of it's employees, including the terminated employee. The trial for the said civil actions was December 6, 1995 to December 18, 1995.

80. That all of the Defendants in this civil action were fully cognizant of the Plaintiff's said Federal EEOC Complaint and of the Plaintiff's subsequent civil actions against Norfolk Southern Corporation.

81. That Norfolk Southern Corporation, while in concert with other Defendants, by counsel, during and after adjudication of the said trial in this Court tendered settlement offers to the Plaintiff, by counsel, offers that had to include the Plaintiff's resignation from the corporation in an attempt to intimidate the Plaintiff for filing the Federal EEOC Complaint and subsequent civil actions, see attached Exhibit A.

82. The Plaintiff rejected the said settlement offers because the Plaintiff had very little interest in resigning the Plaintiff's employment with Norfolk Southern Corporation, and in fact, the Plaintiff made repeated statements to the corporation that the Plaintiff liked and enjoyed the Plaintiff's work and job at the coal pier facility and was not interested in transferring or changing positions. The Plaintiff made these statements before, during and after the trial on several occasions.

83. That Norfolk Southern Corporation, while in concert with the other Defendants, by counsel, suggested to the Plaintiff, by counsel, during the said trial and after the trial was completed that the Plaintiff would be transferred to and undesirable location by the corporation if the Plaintiff did not settle the said civil actions and resign from the corporation in an attempt to intimidate the Plaintiff for filing the Federal EEOC Complaint and the civil actions pursuant to the Federal EEOC Complaint, and to intimidate the Plaintiff to resign from the corporation and or dismiss the other civil action pending against the corporation.

84. That Plaintiff filed another civil action in this Court at 2:95cv1163 against Norfolk Southern Corporation on December 5, 1995.

85. That Norfolk Southern Corporation, while in concert with the other Defendants, commenced continuous and tortuous harassment and surveillance of the Plaintiff and the Plaintiff's family as well as having the Plaintiff and the Plaintiff's family followed and photographed by either the corporation's own police agents or by private investigators.

86. That the said police agents and or private investigators followed and photographed the Plaintiff and the Plaintiff's personal and private activities.

87. That on February 6, 1995 the Plaintiff filed a civil action in Norfolk Circuit Court at Law No. L-96-392 against Norfolk Southern Corporation and its' counsel in the said trial of December 6, 1995 essentially alleging fraudulent and unethical behavior against the Plaintiff during the said trial resulting in injury to the Plaintiff.

88. That most of the defendants in the said civil at Law No. L-96-392, especially Norfolk Southern Corporation, were served with process on February 12, 1996.

89. That Norfolk Southern Corporation, while in concert with the other Defendants, by counsel, was engaged in continuing negotiations with the Plaintiff's trial counsel after the said trial was adjudicated by this Court, for a settlement offer that had to include the Plaintiff's resignation

from the corporation, see attached Exhibit A. Plaintiff continued to reject Norfolk Southern Corporation's settlement offers in exchange for the Plaintiff's resignation from the corporation.

90. That Defendant A. L. Luttrell, a Master Mechanic for Norfolk Southern Corporation, while under the direction of Defendants J. L. Manetta, a vice president-Mechanical and Transportation for Norfolk Southern Corporation, L. D. Hale, an assistant vice president-Mechanical for Norfolk Southern Corporation and T. A. Heilig, a director-Car Maintenance for Norfolk Southern Corporation, notified the Plaintiff by telephone on February 7, 1996 that the Plaintiff's position of Mechanical Foreman - Piers at the said coal pier facility was being abolished and that the Plaintiff was being laterally transferred from Norfolk, Virginia to Decatur, Illinois effective February 16, 1996. The said job abolishment and mandatory job transfer of the Plaintiff were retaliatory in reaction to the Plaintiff's complaints made for sexual harassment, the Federal EEOC Complaint and civil actions, pursuant to the Federal EEOC Complaint, and other civil actions filed by the Plaintiff. The said retaliatory job abolishment and mandatory job transfer represents a reckless and blatant attempt by the Defendants to tortuously intimidate the Plaintiff into dismissing the civil actions pending against the corporation in this Court and Norfolk Circuit Court, both being prosecuted *pro se* by the Plaintiff. The said retaliatory job transfer represents a *reckless and blatant attempt* by the Defendants to tortuously interfere with, stifle and wreak havoc on the Plaintiff's ability to make *a pro se* prosecution of the said pending civil actions against the corporation in Norfolk, Virginia from Decatur, Illinois thereby tortuously interfering with the Plaintiff's constitutional right of access and due process to the Courts.

91. That on February 7, 1996 Mr. Luttrell stated to the Plaintiff that the Plaintiff would probably not like the mandatory job transfer. The Plaintiff told Mr. Luttrell that

the Plaintiff did not like or desired to transfer and was suspect of the job abolishment, mandatory transfer and the reasons and motives therefor.

92. That on February 7, 1996 Mr. Luttrell instructed the Plaintiff to report to Senior General Foreman Charlie McClure at Norfolk Southern Corporation's car repair facility in Decatur, Illinois on February 16, 1996. Mr. Luttrell further stated that he would release the Plaintiff from the Plaintiff's duties at the coal pier facility on February 14, 1996 to travel to Decatur, Illinois.

93. That Plaintiff was given no choice whatever for applying for another position within the corporation, but did intend to report as instructed by Mr. Luttrell to Decatur, Illinois. Norfolk Southern Corporation commissioned Mr. Gray, Mr. Pair, Mr. Henley and Mr. Clemmer on February 7, 1996, just prior to Mr. Luttrell telling the Plaintiff about the Plaintiff's job abolishment and mandatory transfer to Decatur, Illinois, to watch, observe and listen for the Plaintiff's' reaction to the mandatory job transfer while at work in an attempt to learn whether or not the mandatory job transfer would prompt the Plaintiff to resign the Plaintiff's employment with Norfolk Southern Corporation.

94. That Plaintiff sustained an on-duty personal injury on February 8, 1996 to the Plaintiff's lower back and shoulders in a slip and fall incident while at work in Chesapeake, Virginia at Norfolk Southern Corporation's intermodal facility.

95. That Plaintiff reported the personal injury, promptly as required and in a manner consistent with the corporation rules, to the Plaintiff's immediate supervisor, J. E. Pair, on February 9, 1996 by written communication, an unsigned copy of the written communication attached herein as Exhibit B, after the Plaintiff realized (at about 1:00 a.m. on February 9, 1996) that the slip and fall had caused the Plaintiff to be injured resulting in lower back and shoulder pain. Plaintiff reported for work as scheduled on February 9, 1996 at 7:00 a.m.

96. That Plaintiff obtained Mr. Pair's permission to marked off work for severe headaches, back and shoulder pain at approximately 4:10 p.m. on February 9, 1996. Plaintiff was on rest days on February 10 & 11, 1996.

97. That on February 12, 1996 at approximately 11:45 a.m. Mr. Gray, while under the direction of Mr. Manetta, Mr. Hale, Mr. Heilig and Mr. Luttrell, spoke by telephone with the Plaintiff while the Plaintiff was at home and indicated that the Plaintiff must come in to the coal pier facility and see Mr. Pair and complete a form 22 for the said injury to the Plaintiff and the he (Mr. Gray) was instructing that the Plaintiff to come to the coal pier facility and complete the said form. The Plaintiff indicated to Mr. Gray that the Plaintiff had taken medication for pain (medication that recommended not operating a vehicle after taking), but may try to come later to the coal pier. Mr. Gary's tortuous harassing of the Plaintiff about the Plaintiff coming to the coal pier facility, regardless of the Plaintiff's medical condition, was completely unnecessary and without just cause or motivation.

98. That at approximately 3:35 p.m. the Plaintiff told Mr. Pair by telephone that the Plaintiff could not come to the coal pier facility to complete the said form, but Mr. Pair insisted that the said form 22 needed to be and must completed that day by the Plaintiff, February 12, 1996 without exception. Mr. Pair's tortuous harassing of the Plaintiff about the Plaintiff coming to the coal pier facility, regardless of the Plaintiff's medical condition, was completely unnecessary and without just cause or motivation. Mr. Pair, while under the direction of Mr. Manetta, Mr. Hale, Mr. Heilig, Mr. Luttrell and Mr. Gray, came, uninvited, to the Plaintiff's home to bring the said form 22 at approximately 4:25 p.m. on February 12, 1996.

99. That on February 12, 1996 at approximately 4:30 p.m. Plaintiff completed the said form 22 and then Mr. Pair, while under the direction of Mr. Manetta, Mr. Hale, Mr. Heilig, Mr. Luttrell and Mr. Gray, told the Plaintiff that the

Plaintiff was effectively removed from all service with Norfolk Southern Corporation and could not return to work, pending an investigation of the Plaintiff's alleged personal injury, "even if the Plaintiff woke up tomorrow feeling great".

100. That on February 12, 1996 at approximately 4:30 p.m. Mr. Pair, while under the direction of Mr. Manetta, Mr. Hale, Mr. Heilig, Mr. Luttrell and Mr. Gray, told the Plaintiff that the Plaintiff's job transfer to Decatur, Illinois was canceled and the Plaintiff should not report there as previously instructed.

101. That on February 15, 1996 at approximately 1:30 p.m. the Plaintiff confronted the said Norfolk Southern Corporation police agents and or private investigators engaged in the harassing and surveillance of the Plaintiff and Plaintiff's family while they were parked and waiting in the parking lot of an apartment complex (Willow Creek Apartments) near the Plaintiff's home in Virginia Beach, Virginia.

102. That the said corporation police agents and or private investigators, two white males, estimated by the Plaintiff to be in their forties, operated from a dark green Ford Aerostar Minivan, possibly a 1991 or 1992 model, with dark tinted windows, chrome wheels and Virginia license plate number (ZTV 8593).

103. That Plaintiff told the said two white male corporation police agents and or private investigators that the Plaintiff was "*fed up*" with them harassing and watching the Plaintiff and Plaintiff's family's every move.

104. That on February 15, 1996 at approximately 2:45 p.m. the Plaintiff hand delivered a written letter to Defendant J. R. Gray, attached herein as Exhibit C, complaining about the said surveillance of the Plaintiff and the Plaintiff's family by Norfolk Southern Corporation. The said tortuous harassing and surveillance of the Plaintiff and Plaintiff's family was without just cause or motivation.

105. That on February 16, 1996 at approximately 11:45 a.m. Defendants A. L. Luttrell and J. E. Pair, and an unidentified corporation police agent carrying a firearm, while under the direction of Mr. Manetta, Mr. Hale, Mr. Heilig, Mr. Tobias and Mr. Goode, hand delivered to the Plaintiff at the Plaintiff's home a written letter authored by Mr. Luttrell. The said letter was a letter notifying the Plaintiff of the Plaintiff's dismissal from Norfolk Southern Corporation, effective February 16, 1996. A copy of the said letter is attached herein as Exhibit D. All Defendants, while being dominated with personal vengeance and motive of foreclosing the Plaintiff's employment with the corporation and being in the line of supervision over the Plaintiff, are vindicated now that Plaintiff's employment has been terminated, especially Mr. Gray, Mr. Henley, Mr. Pair and Mr. Clemmer since each of them personally hated the Plaintiff and the termination was the ultimate vindication for them for the Plaintiff's exposure of the egregious work environment at the coal pier.

106. That Mr. Luttrell, while acting in concert with Defendants Mr. Goode, Mr. Tobias, Mr. Manetta, Mr. Hale and Mr. Heilig all of whom authorized and acquiesced the Plaintiff's retaliatory job abolishment and mandatory job transfer and wrongful employment termination, perpetrated the retaliatory job abolishment and mandatory job transfer and wrongful employment termination on the Plaintiff. The said job abolishment, mandatory job transfer and wrongful employment termination were without just cause or motivation.

107. That Norfolk Southern Corporation is liable for the wrongful and vindictive actions and wrongful and vindictive activities of it's employees perpetrated against the Plaintiff, including the Civil Rights Violations and Constitutional Rights Violations of the Plaintiff by the Defendants, as before and hereinafter set forth, based on the *Doctrine of Respondent Superior*.

Count 1: Civil Rights Act of 1964, as amended, 42 U.S.C.A. sec. 2000e to 2000e-17 (TITLE VII)

108. Plaintiff realleges and incorporates by reference each and every paragraph 1 through 107, inclusive, and subsequent paragraphs as though fully set forth herein.

109. That Plaintiff is a victim of conspiratorial and intentional and systematic disparate impact and disparate treatment racial discrimination by Norfolk Southern Corporation, while in concert with the other Defendants. The said racial discrimination is a standard operating practice across-the-board against the Plaintiff and other black and minority employees in the corporation and is perpetuated by the corporation's white male landscape of lower, middle, upper and executive management employees.

110. That the Plaintiff is a victim of conspiratorial and intentional and systematic racial harassment, and racially abusive and hostile environment created by the Defendants in response to and after the Plaintiff filed the Federal EEOC Complaint and civil action, pursuant to the Federal EEOC Complaint, and perpetuated by negligent supervision, close scrutiny and increased work load on the Plaintiff.

111. That Plaintiff is a victim of conspiratorial and intentional and systematic retaliation by the Defendants against the Plaintiff for the Plaintiff's filing the said Federal EEOC complaint against Norfolk Southern Corporation in January, 1995, and for complaining about the sexually and homosexually hostile environment perpetuated by the corporation's white male supervisors working at the said coal pier facility in May, 1994.

112. That Plaintiff is a victim of conspiratorial and intentional and systematic retaliation by the Defendants against the Plaintiff for the Plaintiff's filing additional civil actions against Norfolk Southern Corporation in this Court and in Norfolk Circuit Court.

113. That Plaintiff is a victim of conspiratorial and intentional and systematic retaliation by the Defendants

against the Plaintiff for the Plaintiff's said on-duty personal injury sustained on February 8, 1996.

114. That Plaintiff is a victim of conspiratorial and intentional and systematic retaliation by the Defendants against the Plaintiff by Norfolk Southern Corporation's abolishing the Plaintiff's said Mechanical Foreman – Piers position at the coal pier facility.

115. That Plaintiff is a victim of a conspiratorial and intentional and systematic retaliatory job abolishment and mandatory job transfer, by Norfolk Southern Corporation and perpetrated by other Defendants, of the Plaintiff to Decatur, Illinois. Defendants were recklessly attempting to interfere with the Plaintiff's constitutional right of access and due process to the Courts as a *pro se* litigant in the said pending civil actions.

116. That the said retaliations against the Plaintiff were a direct response and reaction by the Defendants for the Plaintiff's filing of the said Federal EEOC Complaint and civil action pursuant to the Federal EEOC Complaint, and for complaining about the sexually and homosexually hostile environment perpetuated by the corporation's white male supervisors working at the said coal pier facility in May, 1994, and for the said civil action filed by the Plaintiff against Norfolk Southern Corporation. The retaliations made against the Plaintiff by the Defendants were without just cause or motivation.

117. That the said Civil Rights Violations of the Plaintiff, including the conspiratorial and systematic and intentional disparate impact and disparate treatment racial discrimination, racial harassment and hostile environment discrimination, and the retaliatory discrimination, and tortuous interference with the Plaintiff's constitutional right of access and due process to the Courts as a *pro se litigant* by the Defendants were neither justified nor excused by the Plaintiff.

COUNT 2: Civil Rights Act of 1866, as amended, 42 U.S.C.A. sec. 1981; 42 U.S.C.A. sec. 1983
COUNT 3: Civil Rights Act of 1866, as amended, 42 U.S.C.A. sec. 1981(b); 42 U.S.C.A. sec. 1983
COUNT 4: Civil Rights Act of 1866, as amended, 42 U.S.C.A. sec. 1988; 42 U.S.C.A. sec. 1983
COUNT 5: Commonwealth of Virginia Discrimination Statute

118. Plaintiff realleges and incorporates by reference each and every paragraph 1 through 107, inclusive, paragraphs 109 through 117, inclusive, and subsequent paragraphs as though fully set forth herein.

COUNT 6: FIRST AMENDMENT, U.S.C.A. Const. Amend. 1; 42 U.S.C.A. sec. 1983
COUNT 7: ARTICLE 4, U.S.C.A. Const.Art. 4, sec. 2, cl.1; 42 U.S.C.A. sec. 1983

119. Plaintiff realleges and incorporates by reference each and every paragraph 1 through 107, inclusive, paragraphs 109 through 117, inclusive, and subsequent paragraphs as though fully set forth herein.

120. That Defendants conspiratorially and systematically and intentionally retaliated against the Plaintiff for the Plaintiff's filing of the said Federal EEOC Complaint and for filing the said civil actions, pursuant to the Federal EEOC Complaint, against Norfolk Southern Corporation. The job abolishment and mandatory transfer of the Plaintiff to Decatur, Illinois represents an attempt by the Defendants to silence the Plaintiff in the Plaintiff's pending civil actions against Norfolk Southern Corporation and interfere with Plaintiff's constitutional right of access and due process to the Court as a *pro se litigant.*

121. That the said retaliations against the Plaintiff in violation of the Plaintiff's First Amendment Rights and Article 4 Rights by the Defendants were neither justified nor excused by the Plaintiff.

COUNT 8: FIFTH AMENDMENT, U.S.C.A. Const.Amend 5; 42 U.S.C.A. sec. 1983

COUNT 9: FOURTEENTH AMENDMENT, U.S.C.A. Const. Amend. 14 42 U.S.C.A. sec 1983

122. Plaintiff realleges and incorporates by reference each and every paragraph 1 through 107, inclusive, and paragraphs 109 through 117, inclusive, paragraphs 120 and 121 and subsequent paragraphs as though fully set forth herein.

123. That Norfolk Southern Corporation's principle business is transportation by railroad and is regulated by the United States Department of Transportation's Federal Railroad Administration (FRA). Defendants conspired to wrongfully avoid reporting the Plaintiff's personal injury to the FRA.

124. That Norfolk Southern Corporation failed and refused to provide the Plaintiff with due process prior to discharging the Plaintiff from employment with the corporation. Defendants conspired to interfere with the Plaintiff's *Constitutional Right to Liberty* in Plaintiff's chosen profession and by injuring Plaintiff's name, standing and association in the Plaintiff's community and by damaging the Plaintiff's possibility to obtain future employment in the Plaintiff's chosen profession of Mechanical Engineering. Defendant's conspired to prevent and interfere with the Plaintiff's traveling from Norfolk, Virginia to Decatur, Illinois, and with the Plaintiff's constitutional right of access and due process to the Courts as a *pro se* litigant with the said retaliatory job transfer.

125. That, after realizing the retaliatory job transfer would not prompt the Plaintiff to resign employment, Norfolk Southern Corporation provided no justifiable explanation to the Plaintiff for the Plaintiff's said employment discharge from the corporation.

126. That Plaintiff is a victim of an abuse of legal process, invidious discrimination and racial hatred by the Defendants.

127. That the said abuse of process, invidious discrimination, racial hatred, tortuous interference with the

Plaintiff's constitutional right of liberty, access and due process to the Courts as a *pro se* litigant and wrongful interference with the Plaintiff's travel plans from Norfolk, Virginia to Decatur, Illinois in violation of the Plaintiff's Fifth Amendment Rights and Fourteenth Amendment Rights by the Defendants were neither justified nor excused by the Plaintiff.

COUNT 10: Civil Rights Act of 1866, as amended, 42 U.S.C.A. sec. 1985(2)
COUNT 11: Civil Rights Act of 1866, as amended, 42 U.S.C.A. sec. 1985 (3)
COUNT 12: Civil Rights Act of 1866, as amended, 42 U.S.C.A. sec. 1986
COUNT 13: Commonwealth of Virginia Conspiracy Act
COUNT 14: Federal Ku Klux Klan Act of 1871
COUNT 15: Federal Conspiracy Act of 1861

128. Plaintiff realleges and incorporates by reference each and every paragraph 1 through 107, inclusive, and paragraphs 109 through 117, inclusive, paragraphs 120 and 121, paragraphs 123 and 127, inclusive, and subsequent paragraphs as though fully set forth herein.

129. That Defendants were intent on extinguishing the Plaintiff's employment from Norfolk Southern Corporation in retaliation for Plaintiff's public exposure, in this Court from December 6, 1995 to December 18, 1995, of the ill will, non-discrete and rampant sexual and homosexual activities occurring between white male supervisors at the said coal pier facility and were perpetuated by the corporation's white male supervisors working at the coal pier facility.

130. That Defendants were intent on extinguishing the Plaintiff's employment from Norfolk Southern Corporation in retaliation for the Plaintiff's public exposure, in this Court from December 6, 1995 to December 18, 1995, of the ill will non-discrete and rampant sexual and

homosexual harassment and hostile environment of the Plaintiff by the corporation's white male supervisors working at the coal pier facility.

131. That Defendants conspired to systematically intimidate the Plaintiff in an attempt to force the Plaintiff to dismiss the said pending civil actions and interfere with the Plaintiff's constitutional right of access and due process to the Courts as a *pro se* litigant, pursuant to Federal EEOC Complaint, against Norfolk Southern Corporation, and against some of the corporation's employees, and to deny the Plaintiff equal protection and immunities under the law.

132. That Defendant conspired to retaliate against and intimate that Plaintiff for the Plaintiff's filing the said Federal EEOC Complaint and subsequent civil actions, pursuant to the Federal EEOC Complaint, against Norfolk Southern Corporation.

133. That Defendants conspired to inflict concomitant injuries on the Plaintiff for the Plaintiff's filing the said Federal EEOC Complaint and subsequent civil actions pursuant to the Federal EEOC Complaint, against Norfolk Southern Corporation. Defendants Mr. Gray, Mr. Henley, Mr. Pair and Mr. Clemmer, all of whom worked at the coal pier facility with Plaintiff, with their participation in the conspiracy activities against the Plaintiff, were acting out of a *personal vindictiveness and racial hatred* (emphasis added) towards the Plaintiff beyond the scope of their normal employment responsibilities for the Plaintiff's whistleblowing of the said ill will, non-discrete and rampant sexual and homosexual activities occurring among all of the white male supervisors working at the coal pier facility and for the Plaintiff's Federal EEOC Complaint made against Norfolk Southern Corporation. Mr. Clemmer and Mr. Henley, while referring to the Plaintiff's job abolishment and mandatory job transfer to Decatur, Illinois, stated the Plaintiff *"got just what he deserved."* The aforesaid statement was the general consensus and feeling among all

of the white male supervisors working at the coal pier facility.

134. That Defendants conspired to infringe on the *Plaintiff's Constitutional Right to Liberty* by defaming, libeling and slandering the Plaintiff with the purpose of damaging the Plaintiff's professional, personal and public reputation and name of the Plaintiff's filing the said Federal EEOC Complaint and subsequent civil actions, pursuant to the Federal EEOC Complaint, against Norfolk Southern Corporation. The Defendants maliciously and wrongfully published unsubstantiated and wrongful reasons for the Plaintiff's employment termination and wrongful reasons for the Plaintiff's employment termination and other written malicious statements with a reckless disregard for the truth, under the influence of racial hatred towards the Plaintiff, defaming, libeling and slandering the Plaintiff so as to cast the Plaintiff in the most negatively infamous or odious light possible. The Plaintiff has never had any disciplinary problems whatever with the corporation. In fact, the Plaintiff has always performed, as required by the corporation, Plaintiff's duties and responsibilities, without exception, in a manner consistent with corporate expectations, policies, rules and other guidelines of Norfolk Southern Corporation.

135. That Defendants conspired to deny the Plaintiff due process by obstructing justice and intimidating the witnesses (all of which were current employees of Norfolk Southern Corporation) from fully and freely testifying at trial prior to and during the said trial of December 6, 1995 in this Court, especially the corporation's witnesses that were supervisors for the corporation. The said intimidation included job status and position of the witness with the corporation possibly being adversely affected.

136. That Defendants conspired to retaliate against and punish the Plaintiff for the "whistleblowing" of the ill will non-discrete and rampant sexual and homosexual activities occurring at the said coal pier facility that were

perpetuated by the corporation's white male supervisors working at the facility.

137. The Defendants conspired in a campaign of racial harrassment against and to punish the Plaintiff for the "whistleblowing" of the ill will, non-discrete and rampant sexual and homosexual activities occurring at the said coal pier facility that were perpetuated by the corporation's white male supervisors working at the facility.

138. That the said conspiracies against the Plaintiff were authorized and perpetuated by the Defendants and from the lower, middle, upper and executive levels of management of the corporation.

139. That the individually named Defendants were not acting within the scope of their respective employment nor in best interest of Norfolk Southern Corporation with their confederate activities against the Plaintiff by their participation in the conspiracies. The Defendant's conspiracy activities climaxed with the Plaintiff's wrongful employment discharge from the corporation on February 16, 1996. Defendant's continued to conspire to perform surveillance of the Plaintiff and the Plaintiff's family after the said wrongful discharge of the Plaintiff from the corporation. All Defendants were fully cognizant of the conspiracy activities and Constitutional Rights and Civil Rights Violations of the Plaintiff and *did nothing within the reach of their authority* to stop the wrongful infringements of the Plaintiff's rights or the across-the-board discriminatory practices complained of herein.

140. The said conspiracies against the Plaintiff in violation of the Plaintiff's Civil Rights were neither justified nor excused by the Plaintiff.

COUNT 16: NEGLIGENT SUPERVISION (CARRIER NEGLIGENCE) - FELA AND FRSA

141. Plaintiff realleges and incorporates by reference each and every paragraph 1 through 107, inclusive, and paragraphs 109 and 117, inclusive, paragraphs 120 and 121, paragraphs 123 through 127, inclusive, paragraphs 129

through 140, inclusive, and subsequent paragraphs as though fully set forth herein.

142. That Defendants D.R. Goode, Corporate Chairman and Chief Executive Officer for Norfolk Southern Corporation, and S.C. Tobias, Executive Vice President of Operations for Norfolk Southern Corporation, are charged by the corporation with the responsibility for ensuring that all corporate policies, including equal employment and affirmative action policies, are fairly administered and complied with at all levels in the corporation.

143. That Defendants J.L. Manetta, D.W. Mayberry, W.E. Honeycutt, C.D. Vittur, T.A. Heilig and L.D. Hale, being upper level managers for Norfolk Southern Corporation, are charged by the corporation with the responsibility for ensuring that all corporate policies, including equal employment and affirmative action policies, are fairly administered and complied with by all employees of the corporation and complied with by all employees of the corporation under their respective jurisdiction.

144. That Mr. Goode and Mr. Tobias are fully cognizant of the lack of blacks and other minority employees at the lower, middle, upper and executive management levels in the corporation and acquiesces the said glass ceiling effect and across-the board discrimination against the Plaintiff and other minorities in the corporation. Mr. Good and Mr. Tobias are fully cognizant that the corporation's equal employment and affirmative action policies are not fairly administered across-the-board at the lower, middle, upper and executive management levels in the corporation and are racially biased against the Plaintiff, blacks and other minorities throughout the corporation.

145. That Mr. Manetta, Mr. Mayberry, Mr. Honeycutt, Mr. Vittur and Mr. Hale are fully cognizant of the lack of blacks and other minority employees at the lower, middle, upper and executive management levels in the corporation and acquiesces and the said glass ceiling effect and across-the-board discrimination against the Plaintiff and

other minorities in the corporation. Mr. Manetta, Mr. Mayberry, Mr. Honeycutt, Mr. Vittur, Mr. Heilig and Mr. Hale are fully cognizant that the corporation's equal employment and affirmative action polices are fairly administered across-the-board at the lower, middle, upper and executive management levels in the corporation and are racially biased against the Plaintiff, blacks and other minorities throughout the corporation.

146. That Mr. Goode and Mr. Tobias are fully cognizant of the disparity in pay levels and rank for the Plaintiff, blacks and other minority employees as compared to white male employees across-the-board at all levels in the corporation and acquiesces the said pay level disparity against the Plaintiff and other minorities throughout the corporation.

147. That Mr. Manetta, Mr. Mayberry, Mr. Honeycutt, Mr. Vittur, Mr. Heilig and Mr. Hale are fully cognizant of the disparity in pay levels and rank for the Plaintiff, blacks, and other minority employees as compared to white male employees across-the-board at all levels in the corporation and acquiesces the said pay level disparity against the Plaintiff and other minorities throughout the corporation.

148. That Defendants negligently supervised their respective jurisdictions in the corporation thereby allowing the acquiescing the systematic disparate impact and disparate treatment discriminatory practices, while being perpetuated against the Plaintiff and other minority employees, infiltrate corporate operating practices across-the-board.

149. That Defendants negligently supervised their respective jurisdiction in the corporation thereby allowing and acquiescing the systematic disparity in pay levels and rank for the Plaintiff and other minority employees, while being perpetuated against the Plaintiff and other minority employees, infiltrate corporate operating practices across-the-board.

150. That Defendants authorized and negligently commenced a campaign of racial harrassment and retaliatory discrimination against the Plaintiff after the Plaintiff filed the Federal EEOC Complaint and civil actions pursuant to the Federal EEOC Complaints.

151. That Defendants negligently supervised Norfolk Southern Corporation's intermodal ramp facility in Chesapeake, Virginia and resulted in an environmental abuse of diesel fuel leaking onto ground causing Plaintiff to slip and fall sustaining a personal injury on February 8, 1996.

152. The said negligent supervision and carrier negligence by the Defendants were neither justified nor excused by the Plaintiff.

COUNT 17: DEFAMATION, LIBEL AND SLANDER - 42 U.S.C.A. sec. 1983

COUNT 18: DEFAMATION, LIBEL AND SLANDER CONSPIRACY - 42 U.S.C.A. sec. 1985(3)

153. Plaintiff realleges and incorporates by reference each and every paragraph 1 through 107, inclusive, and paragraphs 109 through 117, inclusive, paragraphs 120 and 121, paragraphs 123 and 127, inclusive, paragraphs 129 through 140, inclusive, paragraphs 142 through 152, inclusive, and subsequent paragraphs as though fully set forth herein.

154. That Defendants conspired to defame, libel and slander and to injure and harm the Plaintiff's personal, business and professional reputation. Defendants wrongfully published, unsubstantiated and wrongful reasons for the Plaintiff's employment termination as well as other written statements out of racial hatred for the Plaintiff so as to cast the Plaintiff in the most negatively infamous or odious light possible.

155. That Norfolk Southern Corporation, while in concert with the other confederates in this action, intentionally and maliciously defamed, libeled and slandered the Plaintiff with the unjustified letter of dismissal, attached as Exhibit C, to injure the Plaintiff's personal, business and

professional (mechanical engineer) reputation and to create difficulties for the Plaintiff to find employment in the Plaintiff's chosen profession of Mechanical Engineering.

156. That Norfolk Southern Corporation's police agents and or private investigators, in disguise and while under the direction of the Defendants, photographed the Plaintiff's personal and private activities for the corporation's express intent to defame, libel and slander the Plaintiff's personal, business and professional reputation.

157. The Defendants conspired to induce defamation, libel and slander of the Plaintiff and said defamation, libel and slander conspiracy by the Defendants against the Plaintiff were neither justified nor excused by the Plaintiff.

COUNT 19: CONSTITUTIONAL INVASION OF PRIVACY - 42 U.S.C.A. sec. 1983

COUNT 20: INVASION OF PRIVACY CONSPIRACY - 42 U.S.C.A. sec. 1985(3)

158. Plaintiff realleges and incorporates by reference each and every paragraph 1 through 107, inclusive, paragraphs 109 through 117, inclusive, paragraphs 120 and 121, paragraphs 123 through 127, inclusive, paragraphs 129 through 140, inclusive, paragraphs 142 through 152, inclusive, paragraphs 154 through 157, inclusive, and subsequent paragraphs as though fully set forth herein.

159. That on February 12, 1996 Norfolk Southern Corporation, while acting in concert with the other confederates in this action, sent J.E. Pair, uninvited and in disguise (of ascertaining information about the Plaintiff's personal injury on the form 22 of which the corporation did not nor intend to use for reporting the Plaintiff's injury to the FRA), into the Plaintiff's home to make a medical assessment of the Plaintiff's said personal injury without just cause or motivation or qualifications as medical expert.

160. That Defendants authorized and conspired to have surveillance made and photographed of the Plaintiff's

home and personal activities by railroad police agents and or private investigators in disguise.

161. That Defendants authorized and conspired to have the Plaintiff followed on the highways and photographed by railroad police agents and or private investigators in disguise. The unauthorized photographing of the Plaintiff was without just cause or motivation

162. That Defendants authorized and conspired to have the Plaintiff flanked by railroad police agents and or private investigators.

163. That the said surveillance of the Plaintiff by the Defendants created a public perception and presumption that the Plaintiff was engaged in wrongful and or illicit activities so as to cast the Plaintiff in the most negatively infamous or odious light possible.

164. That the said tortuous harassing and surveillance and flanking by the railroad police agents and or private investigators of the Plaintiff represents an intentional ill will attempt by the Defendants to intimidate and injure the Plaintiff.

165. That the malicious stalking of the Plaintiff by the railroad police agents and or private investigators, at the Defendants' directions, was without just case or motivation.

166. That Defendants' abuse of privilege against the Plaintiff and Plaintiff's employment discharge from the corporation are an attempt by the Defendants at intimidating the Plaintiff in the said pending civil actions against Norfolk Southern Corporation. Further, Defendants actions have grossly infringed [by loss of Plaintiff's employment] on the Plaintiff's personal freedoms of the Plaintiff's previously planned procreation with the Plaintiff's wife by the said discharge and resulting in a loss of health, dental, and life insurance benefits, affected Plaintiff's family relationship and ability to adequately financially prepare for Plaintiff's children's higher education all caused by the damaging loss of income and ERISA benefits.

167. The malicious stalking of the Plaintiff and abuse of privilege against the Plaintiff, authorized by the Defendants, were neither justified nor excused by the Plaintiff.

168. The Defendants conspired to induce an invasion of Plaintiff's privacy and the said invasion of privacy and invasion of privacy conspiracy by the Defendants against the Plaintiff were neither justified nor excused by the Plaintiff.

COUNT 21: BREACH OF CONTRACT

169. Plaintiff realleges and incorporates by reference each and every paragraph 1 through 107, inclusive, as though fully set forth herein.

170. That Norfolk Southern Corporation and the Plaintiff entered into an oral contract of employment in August 1985 in Atlanta, Georgia.

171. That the Civil Rights Act of 1964 and the Civil Rights Act of 1866 and the Ku Klux Klan Act and the Conspiracy Act of 1861, and the Commonwealth of Virginia Conspiracy Act are implied provisions of the said oral contract of employment between Norfolk Southern Corporation and the Plaintiff.

172. That Norfolk Southern Corporation is an employer and the Plaintiff is an employee within the meaning of the Civil Rights Act of 1964 and the Civil Rights Act of 1866 and the Ku Klux Klan Act, the Conspiracy Act of 1981, and the Commonwealth of Virginia Conspiracy Act.

173. That the First Amendment, Fourteenth Amendment and Article 4 are implied provisions of the said oral contract of employment between Norfolk Southern Corporation and the Plaintiff.

174. That the Fifth Amendment is an implied provision of the said oral contract of employment between Norfolk Southern Corporation and the Plaintiff.

175. That Norfolk Southern Corporation is an employer and the Plaintiff is an employee within the

meaning of the First Amendment, Fourteenth Amendment and Article 4.

176. That the Norfolk Southern Corporation is an employer and the Plaintiff is an employee within the meaning of the Fifth Amendment.

177. That Norfolk Southern Corporation breached its oral contract of employment with the Plaintiff by its failure to protect the Plaintiff from violations of the Plaintiff's Civil Rights by corporation employees.

178. That Norfolk Southern Corporation breached it's oral contract of employment with the Plaintiff by it's failure to protect the Plaintiff from violations of the Plaintiff's First Amendment Rights and Fourteenth Amendment Rights and Article 4 Rights by corporation employees.

179. That Norfolk Southern Corporation breached its oral contract of employment with the Plaintiff by its failure to protect the Plaintiff from violations of the Plaintiff's Fifth Amendment Rights by corporation employees. The said breach of contract was without just cause or motivation.

180. The Defendants conspired to include breach of contract against the Plaintiff and the said breach of contract by Norfolk Southern Corporation against the Plaintiff was neither justified nor excused by the Plaintiff.

COUNT 22: LIABILITY FOR PERSONAL INJURY TO PLAINTIFF - FELA

COUNT 23: LIABILITY FOR PERSONAL INJURY TO PLAINTIFF - FRSA

181. Plaintiff realleges and incorporates by reference each and every paragraph 1 through 107, inclusive, and paragraphs 109 through 117, inclusive, paragraphs 120 and 121, paragraphs 124 through 127, inclusive, paragraphs 129 through 140, inclusive, paragraphs 142 through 152, inclusive, paragraphs 154 through 157, inclusive, paragraphs 159 through 168, inclusive, paragraphs 170 through 180,

inclusive, and subsequent paragraphs as though fully set forth herein.

182. That Norfolk Southern Corporations, owns, operates and maintains an intermodal ramp facility (referred to as the ramp) at it's Portlock Terminal in Chesapeake, Virginia.

183. That the said ramp facility operates aboveground storage tanks containing diesel fuel.

184. That two Papco aboveground storage tanks of approximately 500 gallon capacity each, and each containing diesel fuel, have a metal containment dike around them to collect spilled diesel fuel at the said ramp facility.

185. That on February 8, 1996 at approximately 5:10 p.m. the said containment dike was full of diesel fuel and water mix and the mix was leaking out of the dike onto the asphalt ground surface.

186. That in the week previous to February 8, 1996, the Chesapeake, Virginia area, especially the ramp facility, had experience severe cold and inclement weather, including several inches of snow and ice.

187. That on or about February 1, 1996 Defendant J.R. Gray instructed the Plaintiff, by the corporation's computer electronic mail memo system, to assist and accompany Mark Cramer of Roy F. Weston, Incorporated in an inspection of petroleum product storage tanks owned and operated by Norfolk Southern Corporation in Norfolk, Chesapeake and Suffolk, Virginia on February 8 & 9, 1996.

188. That on February 8, 1996 Defendant W.F. Henley instructed all coal pier employees, including the Plaintiff, to wear shoe spikes, provided by the corporation, at all times while performing duties outside due to snow and icy conditions. The said shoe spikes are designed to help prevent slips and falls when walking on ice or snow, *and are not recommended, by the manufacturer, for use while walking on other surfaces.*

189. That Plaintiff was wearing the required shoe spikes on February 8, 1996 at approximately 5:10 p.m. while assisting Mark Cramer at the said ramp facility.

190. That on February 8, 1996 at approximately 5:10 p.m. the Plaintiff noticed diesel fuel and water mix leaking from the metal containment dike onto the asphalt ground surface. There was no snow or ice on the asphalt ground surface areas near the dike.

191. That on February 8, 1996 at approximately 5:10 p.m. the Plaintiff, while walking towards the dike to investigate the diesel fuel leak, slipped and fell backwards to the ground near the dike caused by the shoe spikes the Plaintiff was required to wear, and by debris and diesel fuel spilled on the ground from the dike making the asphalt surface very slippery.

192. That Plaintiff sustained a lower back injury and should injury during the said slip and fall on February 8, 1996 at approximately 5:10 p.m. The Plaintiff was working a mandatory twelve hour shift, 7:00 a.m. to 7:00 p.m. Norfolk Southern Corporation is liable for the Plaintiff's on-duty personal injuries under FELA and FRSA.

193. That the said slip and fall causing the Plaintiff to sustain the said lower back and should injuries was caused by negligence of Norfolk Southern Corporation in that the corporation negligently allowed the containment dikes to over-fill with diesel fuel and water mix causing the mix to constantly leak from the metal containment dike and for allowing debris to accumulate on the asphalt walking surfaces and for the Plaintiff's mandatory requirement to wear the shoe spikes at all times while working outside regardless to the type surface the Plaintiff was walking on.

194. That the said slip and fall by the Plaintiff occurred when the Plaintiff's shoe spikes made contact with the debris and diesel fuel negligently left on the asphalt surface.

195. That Plaintiff aggravated the lower back injury and shoulder injury while at work on February 9, 1996 at approximately 7:20 a.m. performing the stretching exercises required by the corporation and during repeated and necessary trips up and down approximately twelve stairs leading to the Plaintiff's office at the said coal pier facility.

196. That the said stairs leading to the Plaintiff's office are not of an Occupational Safety and Health Administration (OSHA) approved designed and are of awkward an improper design and construction and contributed significantly to the aggravation of the Plaintiff's lower-back and should injuries on February 9, 1996.

197. That Plaintiff reported the said personal injury of the Plaintiff's lower back and shoulders to Defendant J. E. Pair by written communication, attached Exhibit B, on February 9, 1996 and after the Plaintiff began to feel pain from the said slip and fall incident later in the night, while sleeping at home, on February 8, 1996.

198. That Norfolk Southern Corporation refused to pay the medical expenses for the Plaintiff's personal injuries.

199. The said negligence by Norfolk Southern Corporation in causing personal injuries to the Plaintiff on February 8, 1996 was neither justified nor excused by the Plaintiff.

COUNT 24: BREACH OF DUTY - FELA AND FRSA.

200. Plaintiff realleges and incorporates by reference each an every paragraphs 1 through 107, inclusive, and paragraphs 109 through 117, inclusive, paragraphs 120 and 121, paragraphs 123 through 127 inclusive, paragraphs 129 through 140, inclusive, paragraphs 142 through 152, inclusive, paragraphs 154 through 157, inclusive, paragraphs 159 through 168, inclusive, paragraphs 170 through 180, inclusive, paragraphs 182 through 199, inclusive, and subsequent paragraphs 182 through 199, inclusive, and subsequent paragraphs as though fully set forth herein.

201. That Norfolk Southern Corporation owed a duty to the Plaintiff to provide the Plaintiff a reasonably safe

place to work, free from assault and battery by corporation employees.

202. The Norfolk Southern Corporation owed a duty to the Plaintiff to provide the Plaintiff a reasonably emotionally safe place to work.

203. That Norfolk Southern Corporation breached it's duty to the Plaintiff by it's failure and negligence in allowing the containment dike to over-fill with diesel fuel and allowing the diesel fuel to leak from the metal containment dike and diesel fuel causing the Plaintiff to slip and fall sustaining injuries to the Plaintiff's lower back and shoulders on February 8, 1996.

204. That Norfolk Southern Corporation breached it's duty to the Plaintiff by it's failure and negligence in removing unnecessary debris from walking areas for the Plaintiff and other employees working at the said ramp facility.

205. That Norfolk Southern Corporation breached it's duty to the Plaintiff by it's negligent and erroneous instruction and directives to the Plaintiff requiring the Plaintiff to wear said shoe spikes while working outside, irrespective of whether ice or snow was in the areas where the Plaintiff was working. Norfolk Southern Corporation further breached its duty to the Plaintiff by maintaining unsafe, improperly designed and unapproved stairs leading to the Plaintiff's office at the coal pier facility.

206. That Norfolk Southern Corporation breached it's duty to the Plaintiff by it's negligent supervision of it's employees, including the other Defendants, campaign of racial, harrassment, retaliation, and intimidation discrimination in violation of the Plaintiff's Civil Rights and Constitutional Rights thereby inflicting emotional distress on the Plaintiff.

207. The Defendants conspired to induce a breach of duty and the said breach of duty by Norfolk Southern Corporation against the Plaintiff was neither justified nor excused by the Plaintiff.

COUNT 25: INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS - FELA and FRSA

COUNT 26: INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

COUNT 27: NEGLIGENT INFLICTIONAL OF EMOTIONAL DISTRESS - FELA and FRSA

COUNT 28: NEGLIGENT INFLICTIONAL OF EMOTIONAL DISTRESS

208. Plaintiff realleges and incorporates by reference each and every paragraph 1 through 107, inclusive, and paragraphs 109 through 117, inclusive, paragraphs 120 and 121, paragraphs 123 through 127, inclusive, paragraphs 129 through 140, inclusive, paragraphs 142 through 152, inclusive, paragraphs 154 through 157, inclusive, paragraphs 159 through 168, inclusive, paragraphs 170 through 180, inclusive, paragraphs 201 through 207, inclusive, and subsequent paragraphs as though fully set forth herein.

209. That Defendants negligent and intentional conspiracies against the Plaintiff, and negligent and intentional campaigns of racial, harassment, retaliation, invidious and intimidation discrimination were in violation of the Plaintiff's Civil Rights and Constitutional Rights thereby inflicting severe emotional distress on the Plaintiff.

210. That Defendants negligently intended to inflict emotional distress on the Plaintiff during the Defendants' ill will attempts at extinguishing the Plaintiff form employment with Norfolk Southern Corporation.

211. That said intentional infliction of emotional distress and negligent infliction of emotional distress by the Defendants upon the Plaintiff were neither justified nor excused by the Plaintiff.

COUNT 29: WRONGFUL TERMINATION AND WRONGFUL DISCHARGE

212. Plaintiff realleges and incorporates by reference each and every paragraph 1 through 107, inclusive, and paragraphs 109 through 117, inclusive, paragraphs 120 and 121, paragraphs 123 through 127, inclusive, paragraphs

129 through 140, inclusive, paragraphs 142 through 152, inclusive, paragraphs 154 *through 157, inclusive,* paragraphs 159 through 168, inclusive, paragraphs 182 through 199, inclusive, paragraphs 201 through 207, inclusive, paragraphs 209 through 211, inclusive, and subsequent paragraphs as though fully set forth herein.

213. That on February 16, 1996 Norfolk Southern Corporation, by Defendants A. L. Luttrell and J. E. Pair, and an unidentified railroad police agent carrying a firearm hand delivered to the Plaintiff at the Plaintiff's home, uninvited, a letter, attached Exhibit D, effectively discharging the Plaintiff form employment with Norfolk Southern Corporation.

214. That Norfolk Southern Corporation and the other Defendant's intent was to sever the Plaintiff's employment with the corporation by use of ill will tactics perpetrated through the said violations of the Plaintiff's Civl Rights and Constitutional Rights and other Rights.

215. That Defendants conspired to induce termination of the Plaintiff's employment by Norfolk Southern Corporation and such termination was wrongful and in retaliation for the Plaintiff's filing the said Federal EEOC Complaint and for filing the civil actions, pursuant to the Federal EEOC Complaint, and other civil actions against Norfolk Southern Corporation.

216. That Plaintiff's employment termination by Norfolk Southern Corporation was wrongful and without just cause or motivation.

217. That Norfolk Southern Corporation, by T. A. Heilig, congratulated the Plaintiff by written communication dated February 29, 1996 (plaintiff terminated on February 16, 1996), attached herein as Exhibit E, after the Plaintiff's employment termination for the Plaintiff's outstanding accomplishments in 1995 for the corporation.

218. The said wrongful discharge of the Plaintiff from employment with Norfolk Southern Corporation was neither justified nor excused by the Plaintiff.

COUNT 30: ASSAULT AND BATTERY

219. Plaintiff realleges and incorporates by reference each and every paragraph 1 through 107, inclusive, and paragraphs 109 through 117, inclusive, paragraphs 120 and 121, paragraphs 123 through 127, inclusive, paragraphs 129 through 140, inclusive, paragraphs 142 through 152, inclusive, paragraphs 154 through 157, inclusive, paragraphs 159 through 168, inclusive, paragraphs 170 through 180, inclusive, paragraphs 182 through 199, inclusive, paragraphs 201-207, inclusive, paragraphs 209-211, inclusive, paragraphs 213-218, inclusive and subsequent paragraphs as though fully set forth herein.

220. That on February 15, 1996 at approximately 1:30 p.m., during the Plaintiff's said confrontation of the railroad police agents and or private investigators near the Plaintiff's home (paragraph 101 above), the Plaintiff got out of the Plaintiff's vehicle and started writing down the vehicle license plate number and type of vehicle being operated by the said railroad police agents and or private investigators.

221. That the driver of the said minivan got out of the minivan, while the passenger (the other railroad police agent and or private investigator) stayed in the minivan, and ask the Plaintiff "what do you think you're doing?".

222. That Plaintiff told the driver that the Plaintiff was writing down the license plate number and the type of vehicle the driver was operating, and that the Plaintiff knew who they (railroad police agents and or private investigators) were and that they were following and harassing the Plaintiff and doing surveillance on the Plaintiff and the Plaintiff's family for Norfolk Southern Corporation.

223. That the driver, while acting out of racial hatred, threatened the Plaintiff with bodily harm (to kick your black ass) for writing down the vehicle information and stated that the Plaintiff did not know what the Plaintiff was talking about.

224. That, while the Plaintiff was standing at the rear of the minivan, the driver (corporation police agent and

or private investigator), while acting out of racial hatred of the Plaintiff, physically pushed the Plaintiff backwards on the Plaintiff's shoulders and told the Plaintiff not to get too close to his vehicle.

225. That Plaintiff asked the driver for their names and the driver refused to identify himself or his passenger. The Plaintiff immediately left.

226. That the said railroad police agents and or private investigators, while under the direction of the Defendants, perpetrated the racial assault and battery of the Plaintiff in furtherance of Defendants conspiracy thereby denying the Plaintiff equal protection and immunities under the law without just cause or motivation. Norfolk Southern Corporation is vicariously liable for the assault and battery of the Plaintiff by the corporation's police agent and or private investigator.

227. That the said assault and battery of the Plaintiff by the said railroad police and or private investigators, while under the direction of the Defendants and in furtherance of their conspiracy against the Plaintiff, were neither justified nor excused by the Plaintiff.

COUNT 31: EMPLOYMENT RETIREMENT INCOME SECURITY ACT OF 1974 (ERISA)

COUNT 32: BREACH OF FIDUCIARY DUTY

228. Plaintiff realleges and incorporates by reference each and every paragraph 1 through 107, inclusive, and paragraphs 109 through 117, inclusive, paragraphs 120 and 121, paragraphs 123 through 127, inclusive, paragraphs 129 through 140, inclusive, paragraphs 142 through 152, inclusive, paragraphs 154 through 157, inclusive, paragraphs 159 through 168, inclusive, paragraphs 170 through 180, inclusive, paragraphs 182-199, inclusive, paragraphs 201 through 207, inclusive, paragraphs 209-211, inclusive, paragraphs 213-218 inclusive, paragraphs 220-227, inclusive, as though fully set forth herein.

229. That Plaintiff was a participant in Norfolk Southern Corporation's ERISA benefits plan from August 16, 1985 to February 16, 1996.

230. That Norfolk Southern Corporation's ERISA benefits are administered by employee agents of the corporation who serve as fiduciaries to the Plaintiff.

231. That Norfolk Southern Corporation's ERISA benefits include Retirement Plan, Thrift and Investment Plan, Comprehensive Benefits Plan, On-Duty Accident Insurance Plan, Long Term Disability Plan, and Death Benefit Plan.

232. That Defendants conspired to induce violation of the Plaintiff's rights under ERISA when the corporation wrongfully terminated the Plaintiff's employment and participation in the ERISA benefits plan without just cause or motivation.

233. That Defendants conspired to induce a breach of fiduciary duty against the Plaintiff by the corporation and it's agent administrator's of the ERISA benefits.

234. That Defendants conspired to induce violation of the Plaintiff's rights under ERISA by it's refusal to pay the medical expenses for the Plaintiff's injuries sustained in the on-duty accident on February 8, 1996.

235. The said violations of the Plaintiff's rights under ERISA and breach of fiduciary duty perpetrated by Norfolk Southern Corporation were neither justified nor excused by the Plaintiff.

236. That Plaintiff timely filed a Charge of Discrimination and an Affidavit in support thereof against Norfolk Southern Corporation in March, 1996 with the Federal EEOC and received a letter of Notice Of Right To Sue from the Federal EEOC. A copy of the said Charge of Discrimination is attached herein as Exhibit F. A copy of the said Affidavit is attached herein as Exhibit G. A copy of the said Notice Of Right To Sue is attached herein as Exhibit H.

WHEREFORE, Plaintiff Michael A. Scott respectfully prays this Court for judgement against the said Defendants, jointly and severally, in the amount of

TWELVE MILLION AND 00/100 DOLLARS ($12,000,000.00), namely FOUR MILLION AND 00/100 DOLLARS ($4,000,000.00) in compensatory damages and EIGHT MILLION AND 00/100 DOLLARS ($8,000,000.00) in punitive damage, for his costs expended in this action, and for his past, present and future mental suffering, bouts with depression, severe distress, severe mental anguish, sleepiness, loss of appetite and weight, stress, anxiety, public humiliation and embarrassment and loss of personal dignity.

ADDITIONALLY, Plaintiffs respectfully prays this Court to:

1. Assess treble damages against the Defendants.

2. Issue a declaratory judgment that the Defendants' acts, practices, policies and procedures complained of herein violated the Plaintiff's rights as secured by the Civil Rights Act of 1866 and the Civil Rights Act of 1964 and the United States Constitution;

3. Grant Plaintiffs a permanent injunction enjoining the Defendant Norfolk Southern Corporation, it's officers, agents, successors, employees, attorney, assignees and other representatives, and all those acting in concert, or participating with them and at their direction, from engaging in any employment practice or policy shown to discriminate against the Plaintiff, blacks and other classes of minority employees in violation of their Civil Rights and Constitutional Rights as herein asserted by the Plaintiff s;

4. Grant Plaintiffs appropriate relief to redress the Civil Rights and Constitutional Rights violations complained of herein;

5. Grant Plaintiff Michael A. Scott appropriate relief to redress the personal injury sustained by the Plaintiff on February 8, 1996;

6. Grant Plaintiffs any other class wide declaratory and injunctive relief as the Court deem proper and just to eradicate the type of class discriminatory practices by the Defendants complained of herein;

7. Retain jurisdiction over this class action to assure full compliance with the orders of this Court and with applicable law by Norfolk Southern Corporation and or alternatively, this Court appoint and independent firm, company, or corporation [at Norfolk Southern Corporation's expense] to monitor Norfolk Southern Corporation's full compliance with the orders of this Court and with applicable law;

8. Grant Plaintiff Michael A. Scott his costs, his fees and disbursements in this action;

9. Grant any other potential Plaintiff(s) their (his/her) costs, fees and disbursements in this action;

10. Grant Plaintiff Michael A. Scott reinstatement of his employment with Norfolk Southern Corporation, back pay for missed salary and ERISA benefit costs and without deduction for unemployment benefits; and

11. Grant such other additional class wide relief as the Court deems is proper and just.

A trail by jury is demanded.

Respectfully submitted,

/s/_____
Michael A. Scott
Plaintiff, pro se

Michael A. Scott
4753 Longmont Road
Virginia Beach, Virginia
23456-5017
(804)495-0844

EXHIBIT A

WILLIAMS KELLY & GREER
A PROFESSIONAL CORPORATION
ATTORNEYS AND COUNSELORS AT LAW
600 CRESTAR BANK BUILDING
POST OFFICE BOX 3146
NORFOLK, VIRGINIA 23514-3416
TELEPHONE: (804) 624-2600
FACSIMILE: (804) 624-2511
TELEX: 4998108

January 5, 1996

HAND DELIVERY

Rex V. Sparks, Esquire
Attorney at Law
125 St. Paul's Boulevard
Suite 600
Norfolk, Virginia 23510

Re: Michael A. Scott
v. Norfolk Southern Corporation, et al.,
Civil Action No. 2:95CV377

Dear Rex:

Enclosed for your records is a supersedeas and appeal bond, which Norfolk Southern has posted in the Federal Court. We posted this bond in response to Judge Smith's requirement of a bond in granting a stay on execution. While we are not wholly dissatisfied with the result before the Court, we are exploring appeal possibilities.

We have also filed a motion to dismiss Mr. Scott's FELA claim in the Federal Court based upon the doctrine of

res judicata. We feel confident that the Court will not tolerate piecemeal litigation of identical facts and claims.

Michael Scott presently has a judgement against Kenny Williams and Norfolk Southern Corporation in the amount of $50,000.00. He also is working in a job that he professes to like, but which he also professes to dread facing each morning. I think it would be in both parties' interest to resolve and terminate the employment relationship.

To that end, Norfolk Southern is willing to pay Michael Scott $70,000.00, in exchange for which he would resign his employment with Norfolk Southern Corporation and execute a release in favor of Norfolk Southern Corporation and Kenny Williams, releasing them from any and all liability for all claims, including the FELA claim. The release would also include a provision that neither he nor anyone acting on his behalf would appeal any of the matters raised in the trail just terminated.

Obviously, time is critical, since we will have to formulate our appeal points and prepare the necessary briefs and other documentation. For that reason, I ask that you respond to this offer as promptly as possible.

If your client is only inclined to respond the way he did at the trail, then I suggest that you save the postage and call me. Like at the trial, such a response is non-responsive, and neither my client nor I will bid against itself.

Thank you for your consideration.

Sincerely yours,

/s/_____
Samuel J. Webster

SJW/sjp

Enclosure

cc: Hunter W. Sims, Jr., Esquire w/Enclosure

EXHIBIT B

February 9, 1996

Norfolk, Virginia

Jeff E. Pair
Engineer Pier Facilities

I am writing to advise you that I sustained an injury to my lower back and shoulders at approximately 5:10 p.m. on yesterday at the Portlock Intermodal Ramp while assisting Mark Cramer of Roy F. Weston, Inc in gathering information for the preparation of SPCC plans. I was in the area of two Papco 500 gallon diesel fuel tanks when I slipped on debris on the asphalt near the tanks as I walked over to investigate overrun of diesel fuel residue from the metal dikes encasing the tanks. The spikes that I was wearing is what made contact with the debris rolling over it causing me to slip backwards and landing on my hands. I aggravated the pain in my lower back and shoulders again during the morning exercises at the coal pier today.
I have not received any medical care as of today for the injury, but I did take Tylenol 3 for pain on last night.

M.A. Scott
Mechanical Foreman - Piers

EXHIBIT C

February 15, 1996

HAND DELIVERED

Mr. Jerry R. Gray
Assistant Master Mechanic
Norfolk Southern Corporation
P.O. Box 3070
Norfolk, Virginia 23514-3070

Re: Shadowing of Michael A. Scott

Dear Sir:

I never would have imagined ten years ago, August 16, 1985 when I proudly and impassionately began working for Norfolk Southern Corporation, that I would be faced with the issues being set forth in this letter. I have experienced some trying and difficult times with Norfolk Southern Corporation over the last ten years, some of which you are fully cognizant of...but through it all I stood steadfast on my pride in working for the corporation and my passion for my work and day to day challenges. I made an erroneous assumption that, if I got through it all, a bright future with the corporation would be near.

NOW COMES the shadowing of Michael A. Scott, the reckless invasion of Michael A. Scott and his family's ***right to privacy***, and the ***reckless, negligent and intentional*** infliction of emotional distress upon Michael A. Scott and his family by Norfolk Southern Corporation by having private investigators and or railroad detectives telephone-then-hang-up, shadow and photograph Michael A. Scott and his family's daily activities ***without just cause or motivation***. Norfolk Southern Corporation's ill will attempt at plotting to

ascertain information on Michael A. Scott using illicit means to support a wrongful discharge of Michael A. Scott from the corporation ***has been detected***. This behavior represents a total disregard for the faithful and honorable service I have performed for the benefit of Norfolk Southern Corporation over the last ten years.

I EMPHATICALLY DEMAND that the reckless investigation and invasion of Michael A. Scott's personal daily activities by Norfolk Southern Corporation be ***IMMEDIATELY DISCONTINUED!!!!***

Respectfully submitted,

/S/_____
Michael A. Scott
Mechanical Foreman – Piers

cc: Mr. A. L. Luttrell
Mr. S. C. Tobias
Mr. D. R. Goode
Mr. L. D. Hale
Mr. T. A. Heilig
Mr. M. D. Perreault

EXHIBIT D

NORFOLK
SOUTHERN

Norfolk Southern Corporation
Roanoke, Virginia 24042-0048

Roanoke, VA
February 16, 1996

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Mr. Michael A. Scott
Mechanical Foreman – Piers
4753 Longmont Road
Virginia Beach, VA 23456

You are dismissed from all your employment with Norfolk Southern Corporation and affiliated companies effective today, February 16, 1996, on account of conduct unbecoming a supervisory employee in connection with an injury you allegedly sustained on February 8, 1996, at the intermodal facility at Portlock
You are instructed to return all Norfolk Southern materials, equipment, keys, credit cards, and other property to J. R. Gray, Assistant Master Mechanic, immediately.

/S/_____
A. L. Luttrell
Master Mechanic

EXHIBIT E

NORFOLK
SOUTHERN

Norfolk Southern Corporation
Mechanical Department
110 Franklin Road, S. E.
Roanoke, Virginia 24042-0078

T.A. Heilig
Director
Mechanical –
Maintenance

SUBJECT: 1995 Supervisor Safety Commendation

February 29, 1996

Mr. M. A. Scott
P. O. Box 8064
Virginia Beach, VA 23450

Dear Mike:

During the past year the safety performance of the Mechanical Department improved by approximately 12% while the Norfolk Territory improved 42%. At Norfolk your specific work group completed 1995 without a reportable injury and certainly contributed to the overall improvement. I realize that managing a safe operation takes the combined effort of everyone at your location with a continuous focus on the Safety Rules and the possibilities for mishap. Keeping this focus and maintaining7 the positive attitude in all your people is a real challenge. You met this challenge during 1995 and are to be commended. I am sure that you will continue your accomplishments throughout 1996.

I congratulate you for such an outstanding effort.

Sincerely,

/S/_____

T. A. Heilig
Director Mechanical Maintenance
cc: MM, Personal Record

EXHIBIT F

CHARGE OF DISCRIMINATION

This from is affected by the Privacy Act of 1974; See Privacy Act Statement before completing this form.

EEOC CHARGE NUMBER
121960256

Virginia Council On Human Rights and EEOC
State or local Agency, if any

NAME (*Indicate Mr., Ms., Mrs.*)
Mr. Michael A. Scott

HOME TELEPHONE (*Include Area Code*)
(804) 495-0844

STREET ADDRESS CITY, STATE AND ZIP CODE
4753 Longmont Road, Virginia Beach, VA 23456-5017

DATE OF BIRTH
11/14/61

NAME
Norfolk Southern Corporation

NUMBER OF EMPLOYEES, MEMBERS
Car D (501 +)

TELEPHONE *(Include Area Code)*
(804) 629-2600

STREET ADDRESS
Three Commercial Place, Norfolk, VA 23514

COUNTY

710

CAUSE OF DISCRIMANATION BASED ON (*Check appropriate box(es)*)

RACE RETALIATION

DATE DISCRIMINATION TOOK PLACE
02/16/96

THE PARTICULARS ARE (*If additional space is needed, attach extra sheet(s)*)

1. I was hired by the Respondent on August 16, 1985 as a Management Trainee. I filed a charge of discrimination with the EEOC during January, 1995 against the Respondent and afterwards I was harassed through increased work load and close scrutiny. During the court action involving my charges, I was told to resign as a part of settlement or be sent to some place I did not like. After the court proceedings, I was told of my job abolishment and mandatory transfer on February 7, 1996 and to report to work in Decatur, Illinois on February 16, 1996. I was discharged from the position of Mechanical Foreman on February 16, 1996.
2. A. L. Luttrell, a White Master Mechanic, stated my job was being abolished as the reason for my transfer. He hand-delivered a letter to my home which stated I had been discharged due to conduct unbecoming a supervisory employee in connection with an injury.
3. I believe I was harassed, transferred, and discharged because of my race, Black and as an act of retaliation because I filed a charge with the EEOC, all in violation of Title VII of the Civil Rights of 1964, as amended.

4. Blacks and other minorities have been excluded from the positions of Master Mechanic and all mechanical positions above Master Mechanic, Assistant Division Engineer and all positions above Assistant Division Engineer, Superintendent and all positions above Superintendent, and General Supervisor Communications and Signals and all positions above General Supervisor Communications and Signals.

I declare under penalty or perjury that the foregoing is true and correct.

March 6, 1996 — Michael A. Scott
Date — Charging Party (*Signature*)

EXHIBIT G

STATE OF VIRGINIA
CITY/COUNTY OF Virginia Beach/Virginia Beach
CASE NAME Scott vs Norfolk Southern
CASE NUMBER 121960256

AFFIDAVIT (cont.)

misconduct, because it was an accident. I had an injury in 1992 which was not considered misconduct. I do not know why the Respondent is taking this position other than to think it retaliation. R. L. Mago, Filipano, C. D. McGraw and G. N. Doss, both White, had injuries on the job, and they were not discharged.

Last summer, W. F. Henley, a White General Foreman, made threats of violence/bodily harm and death against me because I filed the charge. He was one of the persons I accused concerning sexual harassment. Roger D. Lafon, a White Foreman, witnessed the threat. Henley did not make threats to any other employee to my knowledge.

J. R. Gray, a White Assistant Master Mechanic; D. D. Graab, a White Master Mechanic; J. W. Clemmer, a White General Foreman; and J. E. Pair, a White Engineer harassed me by making accusations that I was not participating with other supervisors, not being a team player with other White supervisors, and not regularly attending safety meetings. I do not have a witness to name for this allegation, because I feel no one will be truthful.

J. W. Clemmer stated I was an incompetent Black Engineer. There was no witness.

I was given more and bigger projects than J. E. Pair, J. A. Scott, and J. W. Clemmer to be completed in the same length of time. J. R. Gray gave these assignments through J. E. Pair.

I was followed by private investigators hired by the Respondent. I was able to obtain the evidence to establish I was being followed. I was discharged after I took a letter to J. R. Gray which complained about being followed by the private investigators.

Respondent excludes Blacks and other minorities from the position of Master Mechanic and all mechanical positions above Master Mechanic, Assistant Division Engineer and all positions above Assistant Division Engineer, Superintendent and all positions above Superintendent, and General Supervisor Communications and Signals and all positions above General Supervisor Communications and Signals. Promotions to these positions are done subjectively by recommendation from White male managers. There is no bid system for promotion.

I believe I was harassed, transferred, and discharged because of my race, Black and as an act of retaliation because I filed a charge with the EEOC, all in violation of Title VII of the Civil Rights of 1964, as amended.

STATE OF VIRGINIA
CITY/ COUNTY OF Virginia Beach/Virginia Beach
CASE NAME Scott vs Norfolk Southern
CASE NUMBER 121960256

AFFIDAVIT

I, Michael A. Scott being first duly sworn upon my oath affirm and hereby say:

I have been given assurances by an Agent of the U.S. Equal Employment Opportunity Commission that this Affidavit will be considered confidential by the United States Government and will not be disclosed as long as the case remains open unless it becomes necessary for the Government to produce the affidavit in a formal proceeding. Upon the closing of this case, the Affidavit may be subject to disclosure in accordance with Agency policy.

I am 34 years of age, my gender is Male and my racial identity is Black. I reside at 4753 Longmont Road City of Virginia Beach, County of Virginia Beach State of VA, Zip Code 23456-5017 My telephone number is (*including area code)* (804) 495-0844.

My statement concerns Norfolk Southern Corporation which is located at Three Commercial Place, in Norfolk VA 23514.
My job classification is (*if applicable)* Mechanical Foreman.
My immediate supervisor is (*if applicable)* J. E. Pair, Engineer Pier Facilities.

I was hired by the Respondent on August 16, 1985 as a Management Trainee. I filed a charge of discrimination with the EEOC during January, 1995 against the Respondent and afterwards I was harassed through increased work load and close scrutiny. During the court action involving my charges, I was told to resign as a part of settlement or be sent to some place I did not like. After the court proceedings, I

was told of my job abolishment and mandatory transfer on February 7, 1996 and to report to work in Decatur, Illinois on February 16, 1996. I was discharged from the position of Mechanical Foreman on February 16, 1996.

A. L. Luttrell, a White Master Mechanic, stated my job was being abolished as the reason for my transfer. He hand-delivered a letter to my home which states I had been discharged due to conduct unbecoming a supervisory employee in connection with an injury.

A. L. Luttrell told me I was to report to Decatur, Illinois. I felt the transfer was retaliatory as was the job abolishment. J. Scott, a Black, had his job abolished and he was transferred. I do not recall when this occurred.

I was discharged on February 16, 1996 after I was injured by slipping in some diesel fuel. I do not know why my injury was considered.

EXHIBIT H

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
NOTICE OF RIGHT TO SUE
(Issued on request)

To:
Michael A. Scott
4753 Longmont Road
Virginia Beach, VA 23456-5017

On behalf of a person aggrieved whose identity is CONFIDENTIAL (29 C.F.R. 1601.7(a))

From:

EEOC, Norfolk Area Office
World Trade Center
101 West Main Street, Suite 4300
Norfolk, VA 23510

Number
121960256

EEOC Representative
Marilyn S. Booker, Supervisor

Telephone Number
(804) 441-3135

PERSON AGGRIEVED: This is your NOTICE OF RIGHT TO SUE. It is issued at your request, if you intend to sue the person(s) named in your charge, YOU MUST DO SO WITHIN NINETY (90) DAYS OF YOUR RECEIPT OF THIS NOTICE: BEFORE YOUR RIGHT TO SUE IS LOST.

Less than 180 days have expired since the filing of this charge, but I have determined that the Commission will be unable to complete its process within 180 days from the filing of the charge.

This notice was mailed on the date set out below.

On Behalf of the Commission

3-11-96 /S/_____
(Date Mailed) Herbert Brown, Area Director

Ray W. Stephens, Jr.
Director E E O Manpower Planing
Norfolk Southern Corporation
3 Commercial Place
Norfolk, VA 23510

Copy to: (Respondent)

Respondent's Appendix C
Defendant's Motion to Dismiss

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

MICHAEL A. SCOTT, pro se,
Plaintiff,

v.

NORFOLK SOUTHERN CORPORATION, et al.,
Defendants.

CIVIL ACTION No. 2:96cv257
Filed: May 17, 1996

MOTION TO DISMISS FOR FAILURE TO STATE CLAIMS UPON WHICH RELIEF CAN BE GRANTED AND PLEA OF RES JUDICATA

Defendants, Norfolk Southern Corporation ("NS"), and D.R. Goode, et al. (" Individual Defendants"), move this Court to dismiss certain claims pursuant to Rule 12(b) (6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted, and further state as follows:

Plaintiff's claims in paragraphs 66-75, 77, 79, 80, 84, 88, 110, 111, 129, and 135 of the operative Third Amendment Complaint are barred by res judicata as to bother Norfolk Southern Corporation and the Individual Defendants, based upon the judgment in Michael A. Scott v. Norfolk Southern Corporation, et al., Civil Action Nos. 2:95cv337 and 2:95cv815 (consolidated for trial in December, 1995), and this Court's rulings in Michael A.

Scott v. Norfolk Southern Corporation, et al., Civil Action No. 2:95cv1163.

1. The Title VII claims (Count 1) should be dismissed against the Individual Defendants because none of the Individual Defendants were named as respondents in Scott's EEOC charge, and the Individual Defendants have no individual liability under Title VII, Scott's racial discrimination charges are barred for not having been filed with the EEOC within 300 days of the last alleged act of racial discrimination; Title VII provides no protection from general work place harassment and/or retaliation unrelated to unlawful discrimination, or from retaliation resulting from an employee's personal injury or from retaliation for the filing of lawsuits unrelated to Title VII; Title VII provides no remedy for alleged interference with Scott's "constitutional right of access and due process to the Courts".

2. Scott's claims under 42 U.S.C. § 1983 allege no state action as to NS or the Individual Defendants (Counts 2,3, 4, 6-9, 17, 19).

3. Scott's claims under 42 U.S.C. § 1981 are barred by the applicable statute of limitations, and § 1981 does not support a claim for retaliation for assertion of Title VII rights based upon sex discrimination;

4. The Virginia Human Rights Act (Count 5) creates no independent or private cause of action.

5. Scott's United States' constitutional claims based upon the First Amendment (Count 6), Article 4, Section 2, Clause 1 (Privileges and Immunities) (Count 7), Fifth Amendment (Count 8), and Fourteenth Amendment (Count 9), do not reach private corporations or persons; these constitutional

provision are limitations only upon governmental action.

6. The conspiracy allegation under 42 U.S.C. § 1985 and § 1986 (Counts 10, 11, 12, 14, 15), are vague and barred by the intracorporate conspiracy doctrine and do not apply to Title VII retaliation claims.

7. The Virginia conspiracy statutes (Count 13), Va. Code § 18.2-499 and -500, are directed only at injuries to business interests and not to injuries to an individual's employment interests.

8. Negligent supervision is merely an element of plaintiff's FELA claim and provides no independent cause of action (Count 16).

9. Defamation, libel, and slander (Counts 17 and 18) require specific factual allegations concerning the publication of the remarks.

10. Constitutional invasion of privacy (Count 19) requires governmental action and does not include the actions of private corporations or persons.

11. Virginia recognizes no common law cause of action for invasion of privacy (Count 20).

12. As an at-will employee, plaintiff may not assert violations of Civil Rights laws or the Constitution disguised as a breach of contract claim (Count 21).

13. The Individual Defendants have no liability under FELA or FRSA, and FRSA provides no private cause of action (Counts 16, 22, 23, 24, 25, 27).

14. Plaintiff's allegations fail to support a claim for either intentional infliction or negligent infliction of emotional distress under either FELA or Virginia common law, and Scott makes no allegations bringing him within the "zone of danger" required by the United States Supreme Court (Counts 25, 26, 27, 28).

15. Plaintiff may not assert a wrongful discharge claim (Count 29) based upon retaliation for assertion of Title VII rights.

16. The assault and battery claim (Count 30) fails because the individuals were acting outside the scope of their employment and no intracorporate conspiracy can exist.

17. Plaintiff has failed to allege sufficient facts to support a claim under ERISA or for breach of fiduciary duty (Counts 31, 32), and none of the defendants are proper parties for an ERISA claim.

NORFOLK SOUTHERN
CORPORATION, et al.

BY: /s/_____
Of Counsel

James S. Whitehead, p.d.
Illinois State Bar No. 03004333
SIDLEY & AUSTIN
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Chicago, Illinois 60603
(312) 853-7000

Samuel J. Webster, p.d.
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WILLIAMS, KELLY & GREER, P.C.
600 Crestar Bank Building
500 East Main Street
Post Office Box 3416
Norfolk, Virginia 23514-3416
(804) 624-2600

CERTIFICATE

I hereby certify that I mailed a true copy of the foregoing Motion to Dismiss to the plaintiff, Michael A. Scott, 4753 Longmont Road, Virginia Beach, Virginia 23456-5017, by certified mail, return receipt requested, on this 17th day of May, 1996.

By: /s/ _____
Samuel J. Webster

Respondent's Appendix D
Fifth Amended Complaint With Attachments

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

MICHAEL A. SCOTT, *pro se,* et al.,

Plaintiffs,

v.

NORFOLK SOUTHERN CORPORATION,
Defendant.

Civil Action No. 2:96cv257
Entered: August 16, 1996

OPERATIVE FIFTH AMENDED COMPLAINT
AND DEMAND FOR JURY TRIAL

Plaintiff, Michael A. Scott ("Scott"), for his claim, alleges:

1. This is an action for declaratory, injunctive, monetary, employment reinstatement and other appropriate relief, including costs, attorney's fees and expert witness fees, to redress deprivation of Scott's civil rights, federal statutory rights and common law rights, and other Black Persons civil rights (where specified rights are on behalf of class) by each subsequent Count 1 through 8.

2. Jurisdiction of this Court is invoked to secure protection of and to redress deprivation of rights secured by the Civil Rights Act of 1964, 42 U.S.C. sec. 2000e *et seq.*, hereinafter referred to as "Title VII"; and under the Federal

Employers' Liability Act, 45 U.S.C. sec. 51 *et seq.*, hereinafter referred to as "FELA".

3. This Court is requested, at it's discretion, to exercised pendent jurisdiction over the Commonwealth of Virginia common law claims alleged in Counts 3, 4, 7 and 8 since all claims alleged herein arise from a common nucleus of operative facts.

4. Scott is a black male citizen and resident of the United States and Commonwealth of Virginia residing in Virginia Beach, Virginia. At all material times alleged herein, Scott was an active non-agreement salaried employee of Norfolk Southern Corporation ("NS") from the initial date of his employment on August 16, 1985 through February 16, 1996 and performed his servant duties in a manner consistent with NS policies, rules and other guidelines.

5. Scott was an active employee (hired in Atlanta, Georgia) of NS from August 16, 1985 through February 16, 1996 and, during that period, trained at NS' McDonough, Georgia training center (August 16, 1985 through July 1, 1986), worked and trained at NS' Inman Yard facility in Atlanta, Georgia (about July 1, 1986 through about August 13, 1986), worked at NS' Bluefield, West Virginia Car Department (August 16, 1986 through about October 31, 1989), worked at NS' Norfolk, Virginia 38th Street Car Shop facility ("38th Street") (November 1,1989 through about March 15, 1993), and worked at NS' Norfolk, Virginia Lamberts Point Coal Pier ("coal pier") facility (about March 15, 1993 through February 16, 1996).

6. This civil action is being brought by Scott as a class action under Title VII, pursuant to Rule 23(a) of the Federal Rules of Civil Procedure, on behalf f all past, present and future black employees, male and female, of NS for it's ongoing racially discriminatory practices occurring across-the-board in pay, benefits, hiring, firing, promotions and NS' failure to promote black persons into it's non-agreement salaried positions and it's management hierarchy in a fair, non-discriminatory and non-subjective manner, namely

management levels equal to and above the titles master mechanic (mechanical department), superintendent (transportation department), assistant division engineer (engineering department), general supervisor signals and communications (signals and communications department) and positions equal to or above similar levels in other NS departments not specifically covered by the aforesaid titles

7. NS is a Virginia based corporation with headquarters in Norfolk, Virginia and does business in Norfolk, Virginia; Atlanta Georgia; McDonough, Georgia; and Bluefield, West Virginia. NS is a business providing commercial transportation, primarily by railroad, throughout the southeastern United States and was an employer of Scott within the meaning of Title VII and the FELA from August 16, 1985 through February 16, 1996.

COUNT 1:

Title VII – Racial Discrimination

8. On March 6, 1996, within 180 days of occurrence of the last racially discriminatory acts (Scott's employment termination of February 16, 1996 and last disparate pay on February 29, 1996) set forth herein, Scott timely filed charges of racial discrimination and retaliation against NS with the Norfolk, Virginia Federal Equal Employment Opportunity Commission ("EEOC"), a true copy of the EEOC Charge of Discrimination is attached hereto as Exhibit A.

9. On March 11, 1996, Scott received a "Notice of Right to Sue" letter against NS issued from the EEOC, a true copy of the letter is attached hereto as Exhibit B.

10. The EEOC Notice entitles Scott to seek relief in this Court to redress deprivations of Scott's rights under Title VII by instituting a civil action in a court of competent jurisdiction within 90 days of the date of receipt of the Notice. Title VII is the proper vehicle for Scott to sue on behalf of the class of black persons he purports to represent in this civil action for similar deprivations of their civil rights by NS.

11. Specifically, Scott, when hired by NS on August 16, 1985 as a management trainee, was paid a starting salary of $27,600. Four white males and one white female was hired by NS as a management trainee along with or within two weeks of Scott and was paid a starting salary of at least $28,100. Scott, along with the five white management trainees, attended a management training program together from August 16, 1985 until about July 1, 1986 and were performing the same type work, training. Scott was intentionally inflicted with pay disparity because of his black race on August 16, 1985 and the practice, thereafter, continued until February 29, 1996 when Scott received his last paycheck from NS.

12. Additionally, on or about July 1, 1986, NS sent Scott, temporarily, to train at it's Inman Yard facility under the direction of master mechanic JR Corea ("Corea"). During a private conversation between Corea and Scott (about Scott's future career plans with NS) on his first day at Inman Yard, Corea told Scott that Blacks are not and have never been promoted to the master mechanic level or above with NS and probably never will be, especially Scott.

13. Additionally, on August 16, 1986, Scott was promoted to Foreman Gang CD, a first line supervisory position, in Bluefield, West Virginia under the direction of master mechanic EF Campbell ("Campbell"). Campbell assigned Scott to work in Bluefield Car Department under the supervision of General Foreman HA Haldren ("Haldren"). Within one month prior to and after Scott's promotion, NS promoted the five white management trainees to higher paying and higher rated positions than Scott and that practice continued, thereafter, until Scott's employment was terminated by NS on February 16, 1996.

14. Additionally, from about November 1, 1986 until about October 31, 1989, Scott was assigned to an unofficial acting car foreman's position that served as an assistant to Haldren and, in Haldren's absence, charged with the responsibility of Bluefield Car Department. Haldren told

Scott, when Scott assumed the acting car foreman's position, that he had never had a black assistant and didn't think a black could do the job and that, if he had it his way, he would have selected SE six, a white male foreman gang, as his assistant. Campbell told Scott repeatedly during 1988 and 1989 that he was pursuing management approval to make Scott's acting car foreman position an official car foreman position and would promote Scott to the official position when that approval was received. Scott repeatedly expressed his interest in the official car foreman position to Campbell over the same period.

15. Additionally, during Summer, 1988, Scott complained to Campbell and Haldren about what Scott believed to be racial bias and harassment toward black car repairers working in Bluefield Car Department and, thereafter, was racially attacked by white car repairer, EW Yopp ("Yopp") acting within the scope and course of his NS employment, and then racially harassed by NS, Haldren and Campbell through temporary removal of Scott from his acting car foreman position and reassignment of Scott from first to second shift.

16. Specifically, NS approved Scott's acting car foreman position to become an official car foreman position complete with higher pay and rank effective on November 1, 1989, but simultaneously transferred Scott laterally without pay or rank increase to 38th Street in Norfolk, Virginia to fill the foreman gang position vacated by Russ Parks, a white male Foreman Gang of equal rank with Scott, who was ***promoted*** to the new car foreman position in Bluefield Car Department. Scott was fully qualified for the new car foreman position, especially since he had worked the position in an unofficial capacity from November 1, 1986 through October 31, 1989 and NS, by laterally transferring him, misled, deceived and intentionally discriminated against him because of his race.

17. Additionally, in February, 1993, LC Smith ("Smith"), a white master mechanic over 38th Street and the

coal pier facility, asked Scott if he would be interested in promotion to a general foreman position at the coal pier facility working as a staff engineer and Scott asserted his interest in the position to Smith. Thereafter, Scott made repeated inquiries to Smith and RG Cundiff ("Cundiff"), a white male General Foreman and supervisor of Scott at 38th Street, about his readiness for increased responsibility including indicating his readiness on his written job performance evaluations.

18. Specifically, on April, 1993, NS created four new positions at the coal pier facility, namely general foreman - electrical, general foreman - mechanical, electrical foreman and mechanical foreman. NS promoted JW Clemmer ("Clemmer") from an assistant foreman gang position (lower rank and pay then Scott's foreman gang position) over Scott to the general foreman - mechanical position and promoted Scott to the mechanical foreman position under Clemmer's supervision. NS, by promoting Clemmer around Scott, mislead, deceived and intentionally discriminated against Scott because of his race.

19. Additionally, in July, 1995 and again in late December, 1995, WF Henley ("Henley") directly threatened Scott with death when he remarked to Scott that "I hate you for what you did. Don't le me catch you in a dark alley or I'll wipe you out for what you did to us at the coal pier". Henley made these death threats to Scott because of his race.

20. Additionally, in July, 1995, December, 1995 and January, 1996, Henley directly threatened Scott with bodily harm when he remarked to Scott "if you let me catch you working near the silos at night that'll be the time I stomp you for what you did". Henley made these threats of violence to Scott because of his race.

21. Additionally, from about April, 1995 through January, 1996, DD Graab ("Graab"), JR Gray ("Gray"), Clemmer and JE Pair ("Pair") tortuously harassed Scott by repeatedly accusing Scott of not participating and interacting with the white male coal pier supervisors. Scott repeatedly

asserted to Gray and Pair that it was the white supervisors who singled out Scott and ceased communication with him.

22. Additionally, from about April, 1995 through late January, 1996, Graab, Gray, Clemer and Pair tortuously harassed Scott by closely scrutinizing Scott's work habits, ability and production, on Scott's late Authorized Fund Expenditure ("AFE") projects, especially the pipeline project and the shiploader water tank and elevator projects.

23. Additionally, in late December, 1995, Pair specifically told Scott that DR Gode ("Goode"), SC Tobias ("Tobias"), JL Manetta ("Manetta"), TA Helig ("Heilig") and LD Hale ("Hale") had Scott's fire suppression related projects, manley the pipeline and shiploader water tank projects, under their microscope and the heat was on to complete Scott's fire suppression related projects. Further, Pair specifically told Scott that Tobias was closely tracking all AFE Projects and kept a running status report on Scott's fire suppression related projects and that he was required to provide Tobias and Goode detailed quarterly status reports on all AFE projects, but especially Scott's fire suppression related projects. Scott was being specifically targeted and harassed by Goode, Tobias, Manetta, Heilig and Hale because of his race.

24. Additionally, from January, 1995 through February 9, 1996, Clemmer directly and repeatedly called Scott an incompetent black engineer and that he preferred working with his white male co-op students because Scott could not comprehend his instructions. Clemmer's repeated comments were harassing and made because of Scott's race.

25. Additionally, from June, 1995 through July, 1995, Graab, Gray, Pair and Henley tortuously harassed Scott about the pipeline project and getting the project construction completed. Specifically, Pair told Scott in late July, 1995 that DW Mayberry ("Mayberry"), WE Honeycutt ("Honeycutt") and CD Vittur ("Vittur") were turning up the heat to get Scott's pipeling project completed because they,

Goode and Tobias were concerned about water supply for shiploader fires, the pipeline project and getting it's design and construction completed. Goode, Tobias, Mayberry, Honeycutt, Vittur, Graab, Gray, Pair and Henley were tortuously harassing Scott about the pipeline project because of his race.

26. Additionally, from late November, 1995 through February, 1996, but especially after December 18, 1995, Graab, Gray, A.L. Luttrell ("Luttrell") and Pair accused Scott of not having enough projects to work on and, thereafter, assigned Scott every mechanical oriented AFE project approved by Goode, Tobias, Mayberry, Honeycutt, Vittur, Manetta, Heilig and Hale for the coal pier for 1996 and, thereafter, took away Scott's pipeline project assistant, Gangleader WS Austin, in early January, 1996. Pair specifically told Scott in January, 1996 that he was preparing his quarterly engineering staff project work list for management and that the forty projects Scott had on the list were not enough and that Scott needed to take on more projects. NS' employees were tortuously harassing Scott through increased work load because of his race.

27. Additionally, NS had surveillance performed on Scott at work and at Scott's home by white NS police agents at all times since January, 1995 until after NS terminated Scott's employment on February 16, 1996. NS had surveillance performed on Scott because of his race.

28. Additionally, on February 8, 1996 at about 5:10 p.m., Scott sustained an on-duty injury in a slip and fall incident in Chesapeake, Virginia at NS' intermodal facility. Scott injured his lower back and shoulders and reported the injury to Pair by written communication on February 9, 1996, an unsigned copy attached hereto as Exhibit C, after Scott realized (about 1:00 a.m. on February 9, 1996) that the slip and fall had caused him to be injured resulting in lower back and shoulder pain. Scott reported to work as required on February 9, 1996 at 7:00 a.m. Scott marked off work on February 9, 1996, with Pair's permission, at approximately

4:10 p.m. with severe headaches, back and shoulder pain and was on rest days on February 10&11, 1996. Scott called the coal pier control room on February 11, 1996 during the evening and spoke with Gangleader DR Franklin and told him to mark Scott in the sick book for Monday, February 12, 1996 for the same reasons Scott marked off with on February 9, 1996.

29. Additionally, on February 12, 1996 at about 11:45 a.m., Gray telephoned Scott at his home and instructed Scott to come to the coal pier and see Pair to fill out a form 22 injury report. Scott told Gray that he had taken medication for pain, which recommended not operating a vehicle after taking, but may try to come to the coal pier later that day. Later the same day at about 3:35 p.m. Pair telephoned Scott and insisted Scott come their immediately. Pair specifically told Scott that Manetta, Hale, Luttrell and Heilig instructed him to do whatever it takes to get the form 22 filled out by Scott before Pair went home for the day. Scott refused to come to the coal pier and, thereafter, Pair came uninvited to Scott's home at about 4:25 p.m. and brought the form 22 and Scott completed it. Pair instructed Scott that he was removed from service with NS pending the results of an investigation of Scott's alleged injury and not to return to work even if Scott woke up tomorrow feeling great. Further, Pair instructed Scott that his job transfer to Decatur, Illinois was canceled, thereby denying Scott his new General Foreman position. Manetta, Hale, Lutrell, Heilig, Pair and Gray were tortuously harassing Scott about the injury and denied Scott his new position both because of his race.

30. Additionally, on February 15, 1996 at approximately 1:00 p.m., Scott telephoned Pair at the coal pier and told him that Scott wanted Pair to meet Scott off NS property (since Pair removed Scott from service on February 12, 1996) so that Scott could give him a letter. Pair, after consulting with Gray, instructed Scott that Scott would have to go see and meet with Gray at his 38th Street office and give the letter to Gray. Scott, while under Pair's specific

instructions to deliver the letter to Gray and meet with him at 38th Street, was performing an on-duty function as mechanical foreman for NS and while in route to 38th Street, Scott confronted the NS police agents staked out near Scott's home and got their vehicle license plate number [ZTV 8593 VA] and told the police agents that Scott was delivering a letter to NS complaining about the surveillance and that Scott was fed up with it. A true copy of the letter is attached hereto as Exhibit D.

31. Additionally, on February 16, 1996 at approximately 11:45 a.m., Luttrel, Pair and an NS police agent came uninvited to Scott's home and delivered Scott the letter effectively terminating Scott's employment with NS. Defendants also mailed, certified mail - return receipt requested, the same letter to Scott the same day. A true copy of the letter is attached hereto as Exhibit E. Scott's termination of employment was the last racially discriminatory act of a continuous pattern of discrimination, deception and misleading of Scott.

32. Additionally, the acts described above, presumable advancing NS interests, were acts that transformed Scott's work environment into a haven of danger for Scott creating a racially harassing, and racially abusive and hostile environment for Scott.

TITLE VII – Retaliation for Previous EEOC Charge

33. Specifically, after Scott filed a Title VII sexual harassment claim with the EEOC on January 27, 1995 and prosecuted a lawsuit to trial based on the EEOC claim concluding December 18, 1995, NS, prior to settling the judgment (on January 18, 1996) entered against it in the trial, repeatedly harassed and threatened to transfer Scott to an undesired location if Scott did not accept it's settlement offer that had to include Scott's resignation from NS. See Exhibit F attached hereto. Scott rejected the settlement offers.

34. Additionally, on February 7, 1996, Luttrell notified Scott that his mechanical foreman position at the coal pier was being abolished and that Scott was being

laterally transferred to Decatur, Illinois as a general foreman both effective February 16, 1996. Luttrell denied Scott's request for reconsideration and denied Scott's request to transfer to another position in the corporation and, thereafter, instructed Scott to report to Senior General Foreman Charlie McClure' at NS' Decatur, Illinois car repair facility at 7:00 a.m. on February 16, 1996.

COUNT 2: Personal Injury Under FELA

35. Specifically, NS owns, operates and maintains an intermodal ramp facility (referred to as the ramp) at it's Portlock Terminal in Chesapeake, Virginia.

36. Additionally, the ramp facility operates aboveground storage tanks containing diesel fuel.

37. Additionally, two Papco aboveground storage tanks, standing side by side, of approximately 500 gallon capacity each, and each containing diesel fuel, have a metal containment dike around them to collect spilled diesel fuel at the ramp facility.

38. Additionally, on February 8, 1996 at approximately 5:10 p.m., the containment dike was full of diesel fuel and water mix and the mix was leaking out of the dike onto the surrounding asphalt ground surface.

39. Additionally, in the week previous to February 8, 1996, the Chesapeake, Virginia area, especially the ramp facility, had experienced severe cold and inclement weather, including several inches of snow and ice.

40. Additionally, on or about February 1, 1996, Gray instructed Scott, by NS' computer electronic mail memo system, to assist and accompany Mark Cramer of Roy F. Weston, Incorporated in an inventory of petroleum product storage tanks owned and operated by NS in Norfolk, Chesapeake and Suffolk, Virginia on February 8 & 9, 1996.

41. Additionally, on February 8, 1996, Henley instructed all coal pier employees, including Scott, during a morning safety meeting to wear shoe spikes, provided by NS, at all times while performing duties outside due to snow and icy conditions. The shoe spikes provided by NS are

designed to help prevent slips and falls when walking on ice or snow, *and are not recommended, by the manufacturer, for use while walking on other surfaces.*

42. Additionally, Scott was wearing the required shoe spikes on February 8, 1996 at approximately 5:10 p.m. while assisting Mark Cramer at the ramp facility.

43. Additionally, on February 8, 1996 at approximately 5:10 p.m., Scott noticed diesel fuel and water mix leaking from the metal containment dike onto the surrounding asphalt ground surface. There was no snow or ice on the asphalt ground surface areas near the dike.

44. Additionally, on February 8, 1996 at approximately 5:10 p.m., Scott, while walking towards the dike to investigate the diesel fuel leak, slipped and fell backwards to the ground near the dike caused by the shoe spikes he was required to wear, debris on the asphalt and diesel fuel spilled on the asphalt from the dike making the asphalt surface very slippery.

45. Additionally, Scott sustained a lower back and shoulder injury during the slip and fall on February 8, 1996 at approximately 5:10 p.m. Scott was working a mandatory twelve hour shift, 7:00 a.m. to 7:00 p.m.

46. Additionally, the slip and fall causing Scott to sustain the lower back and shoulder injuries were caused by negligence of NS in that NS negligently allowed the containment dikes to over-fill with diesel fuel and water mix causing the mix to constantly leak from the metal containment dike and for allowing debris to accumulate on the asphalt walking surfaces and for Scott's mandatory requirement to wear the shoe spikes at all times while working outside regardless to the type surface Scott was walking on.

47. Additionally, the slip and fall by Scott occurred when Scott's shoe spikes made contact with the debris and diesel fuel negligently left on the asphalt surface.

48. Additionally, Scott aggravated his lower back injury and shoulder injury while at work on February 9, 1996

at approximately 7:20 a.m. performing the stretching exercised required by NS and during repeated and necessary trips up and down approximately twelve awkwardly designed stairs leading to Scott's office at the coal pier facility.

49. Additionally, the stairs leading to Scott's office were not of an Occupational Safety and Health Administration (OSHA) approved design and were of awkward and improper design and construction and contributed significantly to the aggravation of Scott's lower back and shoulder injuries on February 9, 1996.

50. Additionally, Scott reported his personal injury to Pair by written communication, Exhibit C, on February 9, 1996 after Scott began to feel pain from the slip and fall incident later in the night, while sleeping at home, on February 8, 1996.

51. Additionally, on February 15, 1996, NS emotionally humiliated Scott by it's refusal to pay the medical expenses for Scott's personal injuries.

52. Additionally, the negligence by NS in causing personal injuries to Scott on February 8, 1996 was neither justified nor excused by Scott.

53. Additionally, NS owed a duty to Scott to provide Scott a reasonably safe place to work, free from assault and battery by it's police agents, an incident that aggravated Scott's lower back and shoulder pain when Scott was in route to deliver the letter, Exhibit D, to Gray at his 38th Street office as instructed by Pair.

54. Additionally, NS owed a duty to Scott to provide Scott a reasonably emotionally safe place to work.

55. Additionally, NS breached it's duty to Scott by it's failure and negligence in allowing the containment dike to over-fill with diesel fuel and allowing the diesel fuel to leak from the tanks over-filling the metal containment dike and the diesel fuel causing Scott to slip and fall sustaining injuries to Scott's lower back and shoulders on February 8, 1996.

56. Additionally, NS breached it's duty to Scott by it's failure and negligence in removing unnecessary debris from high traffic walking areas for Scott and other employees working at the ramp facility.

57. Additionally, NS breached it's duty to Scott by it's negligent and erroneous instruction and directives given by Henley to Scott requiring Scott to wear the shoe spikes while working outside, *irrespective* of whether ice or snow was in the areas where Scott was working. NS further breached it's duty to Scott by maintaining unsafe, improperly designed and unapproved stairs leading to Scott's office at the coal pier facility.

COUNT 3: Assault and Battery

58. Specifically, on February 15, 1996 at approximately 1:30 p.m., during Scott's confrontation with the NS police agents near Scott's home (paragraph 30 above), Scott got out of his vehicle and started writing down the vehicle license plate number and type of vehicle being operated by the NS police agents.

59. Additionally, the driver of the minivan, a white male, got out of the minivan, while the passenger (the other white male NS police agent) stayed in the minivan, and ask Scott "what do you think you're doing?".

60. Additionally, Scott told the drive that Scott was writing down the license plate number and the type of vehicle the driver was operating, and that Scott knew who they were and that they were following and harassing Scott and performing surveillance on Scott and his family for NS.

61. Additionally, the driver threatened Scott with bodily harm *(to kick your black ass)* for writing down the vehicle information and stated that Scott did not know what Scott was talking about.

62. Additionally, while Scott was standing at the rear of the minivan, the driver physically pushed Scott backwards on his shoulders, aggravating Scott's lower back and should injuries, and told Scott not to get too close to his vehicle.

63. Additionally, Scott asked the driver for their names and the driver refused to identify himself or his passenger. Scott, stricken with utmost instant fear for his safety, immediately left.

64. Additionally, the NS police agents perpetrated the racial assault and battery on Scott and the incident took place while Scott and both NS police agents were acting within the scope and course of their respective employment with NS. NS is vicariously liable for the racial assault and battery of Scott by the NS police agent.

COUNT 4: Wrongful Discharge and Wrongful Termination

65. Scott realleges and incorporates by reference each and every paragraph 8 through 32, inclusive, as though fully set forth herein.

66. Specifically, on February 16, 1996, NS terminated Scott's employment because of his black race in violation of Commonwealth of Virginia Human Rights Act, Section 2.1-715.

COUNT 5: Intentional Infliction of Emotional Distress under FELA

COUNT 6: Negligent Infliction of Emotional Distress under FELA

COUNT 7: Intentional Infliction of Emotional Distress

COUNT 8: Negligent Infliction of Emotional Distress

67. Scott realleges and incorporates by reference each and every paragraph 8 through 34, inclusive, and 58 through 64, inclusive, as though fully set forth herein.

68. Specifically, Scott became immediately stricken with fear for his life and personal safety at work when Yopp racially attacked Scott as detailed in paragraph 15 above, when Henley threatened Scott with bodily harm as detailed in paragraph 20 above and when the NS police agent threatened Scott with bodily harm as detailed in paragraph 61 above.

69. Additionally, Scott became immediately stricken with fear for his life when threatened with death by Henley as detailed in paragraph 19 above.

70. Additionally, Scott became immediately stricken with fear for his life when he was assaulted and battered by the NS police agent as detailed in paragraph 62 above.

71. Specifically, NS' tortuous racial harassment detailed in paragraphs 21 through 27 and 29 through 32 above occurring collectively with the events of paragraphs 19, 20, 51, 61 and 62 placed Scott at risk of serious harm and in continuous fear for his personal safety and the safety of his family.

72. Specifically, the incident detailed in paragraph 62 above not only inflicted immediate fear in Scott, but the assault and battery also aggravated Scott's lower back and shoulder injuries that he sustained on February 8, 1996 while at work in Chesapeake, Virginia.

73. Specifically, all of the incidents alleged herein occurred while Scott, NS police agents, Messers. Goode, Tobias, Mayberry, Honeycutt, Vittur, Heilig, Hale, Manetta, Graab, Luttrell, Gray, Yopp, Campbell, Corea, Cundiff, Smith and Haldren were acting in the scope and course of their employment with NS and, therefore, NS is liable for the acts of it's servants based on the *Doctrine of Respondeat Superior.*

74. Specifically, for the acts alleged in paragraphs 68 through 72 above, Scott's fear manifested itself through mental suffering, bouts with depression, severe mental distress, severe mental anguish, sleeplessness, loss of appetite and weight, stress, anxiety, public humiliation and embarrassment and loss of personal dignity; all of which significantly affected Scott's psychological well-being.

WHEREFORE, Scott respectfully **prays** this Court for judgment against NS in the amount of TWELVE MILLION AND 00/100 DOLLARS ($12,000,000.00), namely FOUR MILLION AND 00/100 DOLLARS

($4,000,000.00) in compensatory damages and EIGHT MILLION AND 00/100 DOLLARS ($8,000,000.00) in punitive damages, and for his costs expended in this action, and for his past, present and future mental suffering, bouts with depression, severe mental distress, severe mental anguish, sleeplessness, loss of appetite and weight, stress, anxiety, public humiliation and embarrassment, loss of personal dignity and psychological well-being.

ADDITIONALLY, Plaintiffs **pray** this Court to:

1. **Issue** a declaratory judgment that NS' acts, practices, policies and procedures complained of herein violated the Plaintiffs' rights as secured by Title VII;

2. **Grant** Plaintiffs a permanent injunction enjoining NS, it's officers, agents, successors, employees, attorneys, assignees and other representatives, and all those acting in concert, or participating with them and at their direction, from engaging in any employment practice or policy shown to discriminate against Scott and other blacks in violation of their Title VII Rights as herein asserted by the Plaintiffs;

3. **Grant** Plaintiffs appropriate relief to redress the Title VII Rights violations complained of herein;

4. **Grant** Scott appropriate relief to redress the personal injury sustained by him on February 8, 1996;

5. **Grant** Plaintiffs any other class wide declaratory and injunctive relief as the Court deems proper and just to eradicate the type of ongoing across-the-board class discriminatory practices by NS complained of herein;

6. **Retain** jurisdiction over this class action to assure full compliance with the orders of this Court and with applicable law by NS and or alternatively, this Court appoint an independent firm, company or corporation (at NS' expense) as *special master* to monitor NS' full compliance with the orders of this Court and with applicable law;

7. **Grant** Scott his costs, his fees and disbursements in this action;

8. **Grant** any other potential Plaintiff(s) his/her costs, fees and disbursements in this action;

9. **Grant** Scott reinstatement of his employment with NS, back pay for missed salary and ERISA benefits and costs without deduction for unemployment benefits; and

10. **Grant** such other additional class wide relief as the Court deems proper and just.

A trial by jury is demanded.

Respectfully submitted,

/s/_____
Michael A. Scott
Plaintiff, *pro se*

Michael A. Scott
4753 Longmont Road
Virginia Beach, Virginia
23456-5017
(757) 495-0844

CERTIFICATE OF SERVICE

I hereby certify that I mailed, by first class mail, a true copy of the foregoing Amended Complaint to defendants' counsel, Samuel J. Webster, Esq., of Williams Kelly & Greer P.C. at 600 Crestar Bank Building, 500 Main Street, Post Office Box 3416, Norfolk, Virginia 23514-3416 on this 16th day of August 1996.

/s/_____
Michael A. Scott, *pro se*

EXHIBIT A

CHARGE OF DISCRIMINATION

This from is affected by the Privacy Act of 1974; See Privacy Act Statement before completing this form.

EEOC CHARGE NUMBER
121960256

Virginia Council On Human Rights and EEOC
State or local Agency, if any

NAME (*Indicate Mr., Ms., Mrs.*)
Mr. Michael A. Scott

HOME TELEPHONE (*Include Area Code*)
(804) 495-0844

STREET ADDRESS CITY, STATE AND ZIP CODE
4753 Longmont Road, Virginia Beach, VA 23456-5017

DATE OF BIRTH
11/14/61

NAME IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE STATE OF LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (*If more than one list below.)*

NAME
Norfolk Southern Corporation

NUMBER OF EMPLOYEES, MEMBERS
Car D (501 +)

TELEPHONE *(Include Area Code)*
(804) 629-2600

STREET ADDRESS
Three Commercial Place, Norfolk, VA 23514

COUNTY
710

CAUSE OF DISCRIMANATION BASED ON (*Check appropriate box(es))*

RACE RETALIATION

DATE DISCRIMINATION TOOK PLACE
02/16/96

THE PARTICULARS ARE (*If additional space is needed, attach extra sheet(s))*

1. I was hired by the Respondent on August 16, 1985 as a Management Trainee. I filed a charge of discrimination with the EEOC during January, 1995 against the Respondent and afterwards I was harassed through increased work load and close scrutiny. During the court action involving my charges, I was told to resign as a part of settlement or be sent to some place I did not like. After the court proceedings, I was told of my job abolishment and mandatory transfer on February 7, 1996 and to report to work in Decatur, Illinois on February 16, 1996. I was discharged from the position of Mechanical Foreman on February 16, 1996.
2. A. L. Luttrell, a White Master Mechanic, stated my job was being abolished as the reason for my transfer. He hand-delivered a letter to my home which stated I

had been discharged due to conduct unbecoming a supervisory employee in connection with an injury.

3. I believe I was harassed, transferred, and discharged because of my race, Black and as an act of retaliation because I filed a charge with the EEOC, all in violation of Title VII of the Civil Rights of 1964, as amended.

4. Blacks and other minorities have been excluded from the positions of Master Mechanic and all mechanical positions above Master Mechanic, Assistant Division Engineer and all positions above Assistant Division Engineer, Superintendent and all positions above Superintendent, and General Supervisor Communications and Signals and all positions above General Supervisor Communications and Signals.

I declare under penalty or perjury that the foregoing is true and correct.

March 6, 1996
Dated:

Michael A. Scott
Charging Party (*Signature*)

STATE OF VIRGINIA
CITY/ COUNTY OF Virginia Beach/Virginia Beach
CASE NAME Scott vs Norfolk Southern
CASE NUMBER 121960256

AFFIDAVIT

I, Michael A. Scott being first duly sworn upon my oath affirm and hereby say:

I have been given assurances by an Agent of the U.S. Equal Employment Opportunity Commission that this Affidavit will be considered confidential by the United States Government and will not be disclosed as long as the case remains open unless it becomes necessary for the Government to produce the affidavit in a formal proceeding. Upon the closing of this case, the Affidavit may be subject to disclosure in accordance with Agency policy.

I am 34 years of age, my gender is Male and my racial identity is Black. I reside at 4753 Longmont Road City of Virginia Beach, County of Virginia Beach State of VA, Zip Code 23456-5017 My telephone number is (*including area code)* (804) 495-0844.

My statement concerns:

Norfolk Southern Corporation which is located at Three Commercial Place, in Norfolk VA 23514.

My job classification is (*if applicable):*
Mechanical Foreman.

My immediate supervisor is (*if applicable):*
J. E. Pair, Engineer Pier Facilities.

I was hired by the Respondent on August 16, 1985 as a Management Trainee. I filed a charge of discrimination with the EEOC during January, 1995 against the Respondent and

afterwards I was harassed through increased work load and close scrutiny. During the court action involving my charges, I was told to resign as a part of settlement or be sent to some place I did not like. After the court proceedings, I was told of my job abolishment and mandatory transfer on February 7, 1996 and to report to work in Decatur, Illinois on February 16, 1996. I was discharged from the position of Mechanical Foreman on February 16, 1996.

A. L. Luttrell, a White Master Mechanic, stated my job was being abolished as the reason for my transfer. He hand-delivered a letter to my home which states I had been discharged due to conduct unbecoming a supervisory employee in connection with an injury.

A. L. Luttrell told me I was to report to Decatur, Illinois. I felt the transfer was retaliatory as was the job abolishment. J. Scott, a Black, had his job abolished and he was transferred. I do not recall when this occurred.

I was discharged on February 16, 1996 after I was injured by slipping in some diesel fuel. I do not know why my injury was considered.

EXHIBIT B

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
NOTICE OF RIGHT TO SUE
(Issued on request)

To:
Michael A. Scott
4753 Longmont Road
Virginia Beach, VA 23456-5017

On behalf of a person aggrieved whose identity is CONFIDENTIAL (29 C.F.R. 1601.7(a))

From:

EEOC, Norfolk Area Office
World Trade Center
101 West Main Street, Suite 4300
Norfolk, VA 23510

Number
121960256

EEOC Representative
Marilyn S. Booker, Supervisor

Telephone Number
(804) 441-3135

PERSON AGGRIEVED: This is your NOTICE OF RIGHT TO SUE. It is issued at your request, if you intend to sue the person(s) named in your charge, YOU MUST DO SO WITHIN NINETY (90) DAYS OF YOUR RECEIPT OF THIS NOTICE: BEFORE YOUR RIGHT TO SUE IS LOST.

Less than 180 days have expired since the filing of this charge, but I have determined that the Commission will be unable to complete its process within 180 days from the filing of the charge.

This notice was mailed on the date set out below.

On Behalf of the Commission

3-11-96 _____ /s/_____
(Date Mailed) Herbert Brown, Area Director

Ray W. Stephens, Jr.
Director E E O Manpower Planing
Norfolk Southern Corporation
3 Commercial Place
Norfolk, VA 23510

Copy to: (Respondent)

EXHIBIT C

February 9, 1996

Norfolk, Virginia

Jeff E. Pair
Engineer Pier Facilities

I am writing to advise you that I sustained an injury to my lower back and shoulders at approximately 5:10 pm on yesterday at the Portlock Intermodal Ramp while assisting Mark Cramer of Roy F. Weston, Inc. in gathering information for the preparation of SPCC plans. I was in the area of two Papco 500 gallon diesel fuel tanks when I slipped on debris on the asphalt near encasing the tanks. The spikes that I was wearing is what made contact with the debris rolling back and shoulders again during the morning exercised at the coal pier today.

I have not received any medial care as of today for the injury, but I did take Tylenol 3 for pain on last night.

M. A. Scott
Mechanical Foreman-Piers

EXHIBIT D

February 15, 1996

HAND DELIVERED

Mr. Jerry R. Gray
Assistant Master Mechanic
Norfolk Southern Corporation
P.O. Box 3070
Norfolk, Virginia 23514-3070

Re: Shadowing of Michael A. Scott

Dear Sir:

I never would have imagined ten years ago, August 16, 1985 when I proudly and impassionately began working for Norfolk Southern Corporation, that I would be faced with the issues being set forth in this letter. I have experienced some trying and difficult times with Norfolk Southern Corporation over the last ten years, some of which you are fully cognizant of...but through it all I stood steadfast on my pride in working for the corporation and my passion for my work and day to day challenges. I made an erroneous assumption that, if I got through it all, a bright future with the corporation would be near.

NOW COMES the shadowing of Michael A. Scott, the reckless invasion of Michael A. Scott and his family's ***right to privacy***, and the ***reckless, negligent and intentional*** infliction of emotional distress upon Michael A. Scott and his family by Norfolk Southern Corporation by having private investigators and or railroad detectives telephone-then-hang-up, shadow and photograph Michael A. Scott and his family's daily activities ***without just cause or motivation.*** Norfolk Southern Corporation's ill will attempt at plotting to

ascertain information on Michael A. Scott using illicit means to support a wrongful discharge of Michael A. Scott from the corporation ***has been detected.*** This behavior represents a total disregard for the faithful and honorable service I have performed for the benefit of Norfolk Southern Corporation over the last ten years.

I EMPHATICALLY DEMAND that the reckless investigation and invasion of Michael A. Scott's personal daily activities by Norfolk Southern Corporation be ***IMMEDIATELY DISCONTINUED!!!!***

Respectfully submitted,

/s/_____
Michael A. Scott
Mechanical Foreman-Piers

Cc: Mr. A.L. Luttrell
Mr. S.C. Tobias
Mr. D.R. Goode
Mr. L.D. Hale
Mr. T.A. Heilig
Mr. M.D. Perreault

EXHIBIT E

NORFOLK
SOUTHERN

Norfolk Southern
Norfolk Southern Corporation
Roanoke, Virginia 24042-0048

Roanoke, VA
February 16, 1996

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

Mr. Michael A. Scott
Mechanical Foreman-Piers
4753 Longmont Road
Virginia Beach, VA 23456

You are dismissed from all your employment with Norfolk Southern Corporation and affiliated companies effective today, February 16, 1996, on account of conduct unbecoming a supervisory employee in connection with an injury you allegedly sustained on February 8, 1996, at the intermodal facility at Portlock.

You are instructed to return all Norfolk Southern materials, equipment, keys, credit cards, and other property to J.R. Gray, Assistant Master Mechanic, immediately.

/s/_____
A.L. Luttrell
Master Mechanic

EXHIBIT F

WILLIAMS KELLY & GREER
A PROFESSIONAL CORPORATION
ATTORNEYS AND COUNSELORS AT LAW
600 CRESTAR BANK BUILDING
POST OFFICE BOX 3416
NORFOLK, VIRGINIA 23514-3416

TELEPHONE: (804) 624-2600
FACSIMILE: (804) 624-2511
TELEX: 4998106

January 5, 1996

HAND DELIVERY

Rex V. Sparks, Esquire
Attorney At Law
125 St. Paul's Boulevard
Suite 600
Norfolk, Virginia 23510

Re: Michael A. Scott
v. Norfolk Southern Corporation, et al.
Civil Action No. 2:95CV377

Dear Rex:

Enclosed for your records is a supersedeas and appeal bond, which Norfolk Southern has posted in the Federal Court. We posted this bond in response to Judge Smith's requirement of a bond in granting a stay on execution. While we are not wholly dissatisfied with the result before the Court, we are exploring appeal possibilities.

We have also filed a motion to dismiss Mr. Scott's FELA claim in the Federal Court based upon the doctrine of

res judicata. We feel confident that the Court will not tolerate piecemeal litigation of identical facts and claims.

Michael Scott presently has a judgment against Kenny Williams and Norfolk Southern Corporation in the amount of $50,000.00. He also is working in a job that he professes to like, but which he also professes to dread facing each morning. I think it would be in both parties' interest to resolve and terminate the employment relationship.

To that end, Norfolk Southern is willing to pay Michael Scott $70,000.00, in exchange for which he would resign his employment with Norfolk Southern Corporation and execute a release in favor of Norfolk Southern Corporation and Kenny Williams, releasing them from any and all liability for all claims, including the FELA claim. The release would also include a provision that neither he nor anyone acting on his behalf would appeal any of the matters raised in the trial just terminated.

Obviously, time is critical, since we will have to formulate our appeal points and prepare the necessary briefs and other documentation. For that reason, I ask that you respond to this offer as promptly as possible.

If your client is only inclined to respond the way he did at trial, then I suggest you save postage and call me. Like at trial, such a response is non-responsive, and neither my client nor I will bid against itself.

Thank you for your consideration.

Sincerely yours,

/s/_____
Samuel J. Webster

SJW/sjp
Enclosure
cc: Hunter W. Sims, Jr., Esquire w/Enclosure

Respondent's Appendix E
Defendant's Motion for Summary Judgment
Without Supporting Affidavits

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

MICHAEL A. SCOTT, *pro se,*
Plaintiff,

v.

NORFOLK SOUTHERN CORPORATION,
Defendant.

CIVIL ACTION NO. 2:96cv257
Entered: December 16, 1996

DEFENDANT'S MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT

Defendant, Norfolk Southern Corporation, moves to dismiss and for summary judgment pursuant to Rules 12(b)(1), 12(b)(6), and 56 of the Federal Rules of Civil Procedure, and in support thereof, states as follows:

1. Defendant relies upon the attached Affidavit of Steven Hanes, Director of Police.

2. Defendant relies upon the attached Affidavit of Timothy A. Heilig, Director, Mechanical Maintenance.

3. Defendant relies upon the attached Affidavit of Jeff E. Pair, Assistant Superintendent, Norfolk Terminal.

4. Defendant relies upon the attached Affidavit of Jerry R. Gray, Assistant Master Mechanic.

5. Defendant relies upon the discovery deposition of plaintiff, Michael A. Scott, filed herewith.

6. No genuine issues of material fact exist as they relate to plaintiff's claims set forth in the Fifth Amended Complaint.

7. Certain of plaintiff's claims in Count 1 of the Fifth Amended Complaint, alleging Title VII claims, are barred because plaintiff failed to include them in his EEOC Charge and other claims were not presented in a timely EEOC charge of discrimination.

8. Scott's evidence, including his deposition testimony, fails to establish a prima facie case of racially hostile environment in violation of Title VII and Count 1 must be dismissed.

9. Scott is unable to demonstrate that he was discharged because of his race and that claim in Count 1 must be dismissed.

10. To the extent that Scott now claims that his discharge was in retaliation for having filed a previous same-gender sexual harassment charge with the EEOC, he has failed to plead such a claim after five amendments to his Complaint, and it must be dismissed. Furthermore, Scott is unable to demonstrate that he was discharged in retaliation for any protected activity.

11. Scott cannot establish that his proposed transfer to Decatur, Illinois, was in retaliation for having filed a previous EEOC same-gender sexual harassment charge that was ultimately adjudicated in this Court.

12. To the extent that Scott now claims that his proposed transfer to Decatur, Illinois was racially motivated, he has failed to plead such a claim after five amendments to his Complaint, and it must be dismissed. Furthermore, Scott is unable to demonstrate that his transfer was racially motivated.

13. To the extent that Scott now claims other actions of NS or its employees were in retaliation for having filed a previous EEOC same-gender sexual harassment charge, he has failed to plead such a claim after five amendments to his Complaint, and it must be dismissed.

Furthermore, Scott is unable to demonstrate that any actions were retaliatory in nature.

14. Scott's claim set forth in Count 4 for wrongful discharge under the Virginia Human Rights Act must be dismissed on the grounds that it fails to state a claim upon which relief can be granted.

15. Norfolk Southern Corporation is not vicariously liable for the alleged acts of its employees, including the assault and battery alleged in Count 3 of the Fifth Amended Complaint and the claims of intentional and negligent infliction of emotional distress alleged in Counts 5, 6, 7, and 8 of the Fifth Amended Complaint.

16. Scott cannot establish his claims for intentional infliction of emotional distress and negligent infliction of emotional distress under either the FELA or Virginia Common Law as alleged in Counts 5, 6, 7, and 8 of the Fifth Amended Complaint.

17. Certain allegations of Scott's emotional distress claims are barred by the pertinent statutes of limitations.

18. Scott's own negligence was the sole cause of the injury which is the subject of his FELA claim alleged in Count 2 of the Fifth Amended Complaint.

19. Defendant further relies on the arguments and authorities set forth in the accompanying Brief.

WHEREFORE, defendant, Norfolk Southern Corporation, moves the Court for summary judgment on its behalf on all Counts of the Fifth Amended Complaint and prays for dismissal of this action with an award of attorneys' fees and costs.

NORFOLK SOUTHERN CORPORATION

/s/_____

Of Counsel

Samuel J. Webster, p.d.
Virginia State Bar No. 17021
Heather A. Mullen, p.d.
Virginia State Bar No. 29239
David N. Payne, p.d.
Virginia State Bar No. 34910
WILLIAMS, KELLY & GREER, P.C.
600 Crestar Bank Building
500 East Main Street
Post Office Box 3416
Norfolk, Virginia 23514

CERTIFICATE

I hereby certify that a true copy of the foregoing Motion for Summary Judgment was hand delivered to the plaintiff, Michael A. Scott, 4753 Longmont Road, Virginia Beach, Virginia 23456-5017, on this 16th day of December, 1996.

/s/_____
Samuel J. Webster

Respondent's Appendix F
Letter Of Michael A. Scott

February 21, 1996

Mr. D.R. Goode
Chairman and CEO
Norfolk Southern Corporation
Three Commercial Place
Norfolk, Virginia 23514

Re: Discharge Employee Michael A. Scott

Dear Sir:

I am writing you in regard to the referenced employee's recent employment termination by Norfolk Southern Corporation. Though I feel the termination was wrong and unjustified, I am not writing you to discuss the circumstances surrounding that matter. I am writing to advise you of my intentions and the legal consequences, on my behalf against Norfolk Southern Corporation and some of it's current employees, that I will pursue as soon as time and the Federal EEOC Administrative Remedies process allows.

I currently have legal civil suits pending in Federal Court as Civil Action No. 2:95cv1163 against Norfolk Southern Corporation, and in Norfolk Circuit Court at Law No. L96-392 against Norfolk Southern Corporation, Williams, Kelly & Greer P.C. and three of its attorneys, and Kaufman & Canoles, P.C. and three of its attorneys. I expect to prevail in both civil actions, but especially in Law No. L96-392.

At the conclusion of the Federal EEOC Administrative process for the ten years of cumulative events and circumstances that led to my employment termination by Norfolk Southern Corporation, as well as just being a ***Black Man*** systematically discriminated against by the corporation, I will file a new complex civil action in Federal Court

against the following: Norfolk Southern Corporation, D.R. Goode, S.C. Tobias, D.W. Mayberry, W.E. Honeycutt, L.D. Hale, T.A. Heilig, C.D. Vittur, D.D. Graab, A.L. Luttrell, J.R. Gray, W.F. Henley, J.E. Pair and J.W. Clemmer. The new civil action will include Federal Constitutional Law and Statutes, and Commonwealth of Virginia Law as follows:

1. Violation of Civil Rights Act of 1964, as amended, 42 U.S.C.A. sec. 2000e to 2000e-17 that will include systematic disparate impact, disparate treatment, racial, harassment, retaliation…discrimination.
2. Violation of Civil Rights Act of 1964, as amended, 42 U.S.C.A. sec, 1981 prosecuted through 42 U.S.C.A. sec. 1983 that will include systematic disparate impact, disparate treatment, racial, harassment, retaliation.. discrimination.
3. Violation of First Amendment, 42 U.S.C.A. Const. Amend. 1 prosecuted through 42 U.S.C.A. sec. 1983 that will include retaliation.
4. Violation of Civil Rights Act of 1964, as amended, 42 U.S.C.A. sec. 1985(3) that will include a violated intracorporate conspiracy.
5. Violation of the Fifth Amendment, 42 U.S.C.A. Const. Amend. 5 prosecuted through 42 U.S.C.A. sec. 1983.
6. Violation of the American with Disabilities Act.
7. Negligent Supervision, Executive and Middle Management.
8. Libel, Slander, Defamation.
9. Invasion of Privacy.
10. Intentional Infliction of Emotional Distress-FELA

11. Intentional Infliction of Emotional Distress.

12. Negligent Infliction of Emotional Distress-FELA.
13. Negligent Infliction of Emotional Distress.
14. Carrier Negligence Causing Injury of February 8, 1996-FELA.
15. Breach of Duty-FELA.
16. Breach of Contract.
17. Malicious Stalking.

I realize that my relationship with Norfolk Southern Corporation is hopeless and I have accepted that in it's context. One of my primary objectives in the upcoming new civil law suit will be to establish a prima facie case of systematic discrimination at all levels in the corporation and publicly expose the ***obvious systematic discriminatory practices***, with regards to myself and other Minority Employees, of Norfolk Southern Corporation impliedly through disparate impact and disparate treatment discrimination theories under the Civil Rights Act. Perhaps my efforts will, in that arena, benefit other minorities in the future with the corporation.

Because the civil battles ahead will be trying and difficult for all parties, I am prepared to ***forever release all parties from liability*** in the said pending civil actions and the upcoming civil action outlined above in exchange for the following:

1. Three Million and 00/100 dollars ($3,000,000.00)
2. Reinstatement of my heath and dental insurance benefits for twenty one years.
3. Reinstatement of my life, and accidental death & dismemberment insurance policies for the remainder of my natural life.

4. Neutral references from Norfolk Southern Corporation in the future.
5. Full retirement pension and health benefits in the amount previously projected by Norfolk Southern Corporation beginning at age 55.
6. Paid medical expenses for the recent on-duty personal injury of February 8, 1996 for the next two years.

In the interest of preserving judicial resources and avoiding needless, complex and expensive litigation, as well as public scrutiny, I submit this offer to you and the recipients named below for consideration. I now have the time, energy, motivation, and certainly the intelligence to pursue the aforesaid matters to the fullest extent of the law as a ***pro se prosecutor*** at minimal personal expense.

Respectfully submitted,

/s/_____
Michael A. Scott

cc: **Samuel J. Webster**, Esquire
@ Williams, Kelly & Greer, P.C.
Hunter W. Sims, Jr., Esquire
@ Kaufman & Canoles, P.C.

Respondent's Appendix G
Conformed Jury Verdict Forms

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

MICHAEL A. SCOTT, *pro se*,
Plaintiff,

v.

NORFOLK SOUTHERN CORPORATION,
Defendant.

Civil Action No: 2:96cv257

VERDICT FORM – FIRST CLAIM

1. We, the jury, find that the defendant racially harassed the plaintiff under Federal Law: NO; and

2. We, the jury, find that the defendant terminated the plaintiff's employment because of his race in violation of Federal law: NO; and

5. We, the jury, find for the defendant with respect to the plaintiff' first claim: YES

/s/_____
Foreperson

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

MICHAEL A. SCOTT, *pro se,*
Plaintiff,

v.

NORFOLK SOUTHERN CORPORATION,
Defendant.

Civil Action No: 2:96cv257

VERDICT FORM – SECOND CLAIM

1. We, the jury, find that the defendant terminated the plaintiff's employment because of his race in violation of the law of Virginia: NO; and

4. We, the jury, find for the defendant with respect to the plaintiff's Second Claim: YES

/s/_____
Foreperson

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

MICHAEL A. SCOTT, *pro se*,
Plaintiff,

v.

NORFOLK SOUTHERN CORPORATION,
Defendant.

Civil Action No: 2:96cv257

VERDICT FORM – THIRD CLAIM

1. We, the jury, find in favor of the plaintiff with respect to his FELA claim against the defendant: YES; and

2. If YES, we, the jury, award the plaintiff compensatory damages of $10,200.00 without reduction for plaintiff's negligence, if any, with respect to his Third Claim.

3. If compensatory damages are awarded, did plaintiff's negligence contribute to his injury?: YES, if YES, in what percentage did his negligence contribute to his injury: 51%.

OR

4. We, the jury, find for the defendant with respect to the plaintiff's Third Claim: NO.

/s/_____
Foreperson

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

MICHAEL A. SCOTT, *pro se*,
Plaintiff,

v.

NORFOLK SOUTHERN CORPORATION,
Defendant.

Civil Action No: 2:96cv257

VERDICT FORM – FOURTH CLAIM

1. We, the jury, find for the plaintiff in his claim of assault and battery against the defendant: NO;

OR

3. We, the jury, find for the defendant with respect to the plaintiff's Fourth Claim: YES

/s/_____
Foreperson

Respondent's Appendix H
Excerpts Of Transcript Of Motion Hearing
On August 5, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

MICHAEL A. SCOTT, et cetera,

Plaintiffs,

vs.

NORFOLK SOUTHERN CORPORATION,

Defendant.

CIVIL ACTION
NOS. 2:96cv257, 2:95cv1163, and 2:96cv610

TRANSCRIPT OF MOTIONS

BEFORE THE HONORABLE
HENRY COKE MORGAN, JR.
UNITED STATES DISTRICT JUDGE

August 5, 1996

2:00 p.m.

Diane M. Gray, Official Court Reporter

THE COURT: Anyone who has a good case, Mr. Scott, doesn't have to allege every possible complaint that they can think of or find in whatever sources you are looking in. If you have a good case, that's not necessary. It's generally thought of among experienced practitioners and judges that anyone who alleges every possible thing they can conceivably think of is doing so not because they have a legitimate complaint, but because they don't.

And when you come in with an allegation - - with a complaint with 32 different counts in it, it does not make your complaint look stronger; it makes it look weaker. And if you wish to file a complaint in this court, you would be much better advised to try and concentrate on an area in which you have some reasonable allegation. And when you have 32 counts, it just makes your complaint look like you're trying to, if not harass the defendant, just think up any conceivable basis of a suit against them, which is either harassment or an admission of weakness. I can't think of any other way to view it other than one of those two ways, Mr. Scott.

And I also don't understand why it's necessary to keep filing successive lawsuits. After the court has given you leave beyond which it gives most people to amend, you keep - - as soon as you do that, you keep asking to amend; and if after two or three amendments, the court says you can't amend anymore, you file a separate lawsuit, and it just keep going and going. And why you think that it wold impress anybody as having any merit, I don't understand.

Now you may address the remarks which counsel has made, but I would suggest that this would be a good time to start dealing with issues in which you have a legitimate basis and not simply just saying, well, every one of them is perfectly good, because I can tell you right now that they're not, Mr. Scott. There is no conceivable way that the court would consider letting these 32 counts stand. There's no way that the court would consider allowing a majority of

them to stand. Now, you would be well advised to try to direct your efforts toward ones which you think have some merit, some facts to back them up. Now, if you wish to address them one by one, you may do so.

MR. SCOTT: Thank you, Your Honor. I'd like to start with count 1. It's clear that the defendants are attempting to steer my Title VII claim in the area or retaliation. And that's being done for a lot of reasons.

THE COURT: It is not - - is that not what you are claiming? You are not claiming retaliation?

MR. SCOTT: I apologize, Your Honor. I am claiming retaliation, but I have also connected that with racial discrimination through my complaint.

THE COURT: Well, you have not made an EEOC complaint within the time limit that would enable you to made a racial discrimination claim based on what you have in this complaint; so if you have any complaint whatsoever in count 1, it's only for retaliation.

MR. SCOTT: Well, Your Honor, viewing my EEOC complaint, you know, and I am sure the court has had an opportunity to review it, but some of the allegations that are on my charge of discrimination as well as my supporting affidavit to that charge are clearly , you know, referencing racial discrimination. In fact, it states right on the face of the charge of discrimination that I believe I was harassed, discharged because of my race, black. It's right on the face of the charge of discrimination.

So it's - - you know, I was advancing and in my intent was to advance two parallel theories here that, number one, I was racially discriminated against, and number tow, I was retaliated against for having filed a formal EEOC complaint in January of 1995. And I think just a cursory take on that charge of discrimination will indicate that I am clearly advancing two charges of discrimination, that being racial discrimination and retaliation as well.

THE COURT: All right. The court is going to allow you to amend the count 1 of your complaint so as to

state in clear and brief terms exactly what it is that you are complaining of. And I caution you, Mr. Scott, that you had better direct your efforts toward brevity in any further papers that you file in this court and clarity rather than verbosity and quantity. So I am going to allow you to amend that if you can state it in understandable terms to the court exactly what you are seeking. It's clear that you can seek - - it's clear that at this stage you can at least seek retaliation. Beyond that I'm not prepared to go. Let's move on.

MR. SCOTT: Thank you, Your Honor.

Respondent's Appendix I
Excerpts Of Transcript Of Motion Hearing
On August 5, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

MICHAEL A. SCOTT, et cetera,

Plaintiffs,

vs.

NORFOLK SOUTHERN CORPORATION,

Defendant.

CIVIL ACTION
NOS. 2:96cv257

TRANSCRIPT OF MOTIONS

BEFORE THE HONORABLE
HENRY COKE MORGAN, JR.
UNITED STATES DISTRICT JUDGE

January 28, 1997
2:10 p.m.

APPEARANCES:

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and
By: Samuel J. Webster
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Court Staff Present:
John Watts, Law Clerk
Sandra Dance, Deputy Clerk
John V. King, Court Security Officer
Diane M. Gray, Official Court Reporter
2:00 p.m.

Diane M. Gray, Official Court Reporter

All right. You can have a seat, Mr. Scott.

MR. SCOTT: Thank you. All right.

THE COURT: The court cannot say as a matter of law that count one fails to state a cause of action for racial harassment, racial discharge, or retaliatory transfer.

The court can state that under count one, the plaintiff will not be able to assert a cause of action for discriminatory pay practices. That is not a part of the count. It was not in his complaint. It's not reasonably related to anything that was in his complaint and will not be considered. Neither will the failure - - his failure to get a promotion be considered under count one because, as in the case of the pay, it was not mentioned in the EEOC complaint. Only two instances were mentioned in the complaint, the fifth amended complaint itself, two were added later for discovery.

That two that were mentioned in the complaint would have been barred anyway because they weren't mentioned in the EEOC complaint, but even if they were not barred for that reason, the statute of limitations would have run out on the initial two. The other two were added in the course of the discovery. The Court made it abundantly clear to Mr. Scott at the last hearing, and Mr. Scott denies that he's receiving any legal help on this, but I will have to observe that Mr. Scott has a rare facility for using the same type of language that lawyers do. I don't know where he got that facility, but he certainly has the facility for doing it. Perhaps he's missed his calling.

But he has certainly displayed the ability to understand what this court tells him and to understand a lot of very technical points under the law. So when the court told him last time that he had to set forth specifically and clearly what he was complaining about in his complaint, the court meant exactly what it said, and he's not going to just be able to keep adding complaints as he goes along. Every time

something pops into his head, he can't add it to his complaint.

His complaint said nothing about any promotions other than the two older ones, and the two that he added will not be considered for that reason, and for the reason, of course that they were not contained in any EEOC complaint or reasonably related thereto.

Now, he's complained of racial discharge and retaliatory transfer. He has not complained of retaliatroy discharge or racial transfer. I wish to make that clear. He may proceed on racial harassment, racial discharge, and retaliatory transfer as far as one count is concerned, and that is it.